SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FEB 12 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1111

JEHOVAH'S WITNESSES in the State of Washington; GERALDINE SEELYE, a widow, BRADLEY SCOTT SEELYE, a minor, whose natural guardian is GERALDINE SEELYE; JACK PEN and HAZEL PEN, his wife, MICHAEL PEN, a minor, whose natural guardian is JACK PEN; RICHARD BROCKMAN and BERNICE BROCKMAN, his wife, SHARILYN BROCKMAN, a minor, whose natural guardian is RICHARD BROCKMAN; JAMES LAWRENGE and HELEN LAWRENCE, his wife, HEIDI JO LAWRENCE,

Appellants (continued inside cover),

vs.

KING COUNTY HOSPITAL UNIT NO. 1 (HARBORVIEW), MAX R. NICOLAI, PETER J. EMT, CECIL JENKS, RICHARD KLINGE, and LESLIE ROBERTS, Trustees of KING COUNTY HOSPITAL UNIT NO. 1, and WILLIAM L. BRANSON, Administrator; UNIVERSITY OF WASHINGTON HOSPITAL of the Division of Health Sciences of the University of Washington; THE HONORABLE ATTORNEY GENERAL of the State of Washington; ROBERT J. WILLIS, HAROLD S. SHEFELMAN, JOHN L. KING, JOSEPH DRUMHELLER, JAMES ELLIS and GEORGE POWELL, Regents of the UNIVERSITY OF WASHINGTON;

Appellees (continued inside cover),

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

STATEMENT AS TO JURISDICTION

VICTOR V. BLACKWELL
P.O. Box 1180
Covington, Louisiana 70433

W. GLEN HOW, Q.C.
Of Counsel

DANIEL BRINK
1418 IBM Building
Seattle, Washington 98101

KENNETH S. JACOBS
207 South Villa Avenue
Villa Park, Illinois 60181

Attorneys for Appellants

Appellants (*continued from front cover*)

a minor, whose natural guardian is JAMES LAWRENCE; NORMAN C. MAYDOLE, and CAROLYN MAYDOLE, his wife, RUSSELL SCOTT MAYDOLE, a minor, whose natural guardian is NORMAN C. MAYDOLE; ADRIAN W. ELAM and JEFFREY WARD ELAM, a minor, whose natural guardian is ADRIAN W. ELAM; CLIFFORD BURNITT and JOYCE BURNITT, his wife, THOMAS ALLEN BURNITT, a minor, whose natural guardian is CLIFFORD BURNITT; OLITE SMITH and AZELL SMITH, his wife, JEANETTER SMITH, a minor, whose natural guardian is OLITE SMITH; NEIL NICHOL and PATSY NICHOL, his wife, GERI LYNN NICHOL, a minor, whose natural guardian is NEIL NICHOL; GENE HARDY and DONNA HARDY his wife, LOREN HARDY, a minor, whose natural guardian is GENE HARDY; MARTHA RIDGE, a married woman; EVONNE SAYERS, a married woman; WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, a nonprofit corporation;

Appellants,

Appellees (*continued from front cover*)

CHARLES ODEGAARD, President of the UNIVERSITY OF WASHINGTON; L. S. RAMBECK, Administrator, UNIVERSITY OF WASHINGTON HOSPITAL; THE BOARD OF MANAGERS OF FIRLANDS SANATORIUM; STEVENS MEMORIAL HOSPITAL; TRI-STATE MEMORIAL HOSPITAL; ROBERT A. ALDRICH, M.D.; JOHN ALLEN, M.D.; DONALD E. BROWN, M.D.; DONALD FAGER, M.D.; CARL B. ERICKSON; WARREN GUNTHEROTH, M.D.; FRED J. JARVIS, M.D.; THOMAS G. JORDAN; FRANKLIN KELLS, M.D.; JAMES KLEIN, M.D.; LAWRENCE LEAHY; WILLIAM G. LONG; ROBERT F. MILLER, M.D.; LLOYD NYHUS, M.D.; ROBERT OLSON, M.D.; PHILLIP SHERIDAN; ALAN SOLA, M.D.; THEODORE S. TURNER; ROBERT F. UTTER; LOREN C. WINTERSCHEID, M.D.; COMMUNITY MEMORIAL HOSPITAL, Enumclaw;

Appellees.

INDEX

Subject Index

	PAGE
Statement as to jurisdiction	1
Opinion	2
Grounds for invoking jurisdiction	2
Questions presented	5
Statement of the case	10
Why questions are substantial	13
I. The questions presented by this appeal are substantial in that they raise for the first time several basic constitutional issues respecting the power of a state to invade the sanctity of respectable and conscientious families solely because the parents differ with state officials as to what is beneficial for their children.	13
II. The court below upheld the validity and constitutionality of the Juvenile Court Act of the State of Washington, as applied to appellants and their minor children, by forcing on them the objectionable and dangerous medical therapy of transfusing human blood under the pretended authority of state court decrees hastily granted without a meaningful hearing, thereby depriving appellants and their children of free exercise of religion, freedom of association, freedom from establishment of religion, without due process of law in violation of the First and Fourteenth Amendments to the United States Constitution.	16
III. Actions of the appellees as officers of the State of Washington acting under color of law in seizing and removing from parents their own children is a violation of appellants' rights under the Fourth Amendment to be free in	

PAGE

person from unreasonable seizure; their Eighth Amendment right to be free from cruel and unusual punishment; their Ninth Amendment right to be protected in their family privacy and family circle; their constitutional immunity from a Bill of Attainder under Article 1, Sections 9 and 10; and their constitutional right to be free from domination by a privileged class, medical doctors, unconstitutionally given a privileged position as a "title of nobility." 20

IV. Did the District Court properly rely on *Prince* v. *Massachusetts*, 321 U. S. 158, then rightly take refuge in the equitable doctrine of abstention, should it be held *Prince* was not a proper basis on which to rest its decision? 20

A. *Prince* is not applicable to the case at bar and *Prince* is in any event of dubious authority in the light of other recent decisions. .. 20

B. After deciding the case on the merits, the trial court committed the dual error of (i) retreating to the doctrine of abstention of its decision on the merits if erroneous and (ii) applying the doctrine of abstention in a situation where it has no proper or permissible application. 24

C. Even if it were applicable, the doctrine of abstention is discretionary. To apply it to this case would, appellants believe, be an abuse of judicial discretion. 30

Conclusion 36

CASES CITED

Adler v. Board of Education
342 U. S. 485 ..... 3, 15

PAGE

Anastaplo, In re
366 U. S. 82 15

Bailey v. Patterson
369 U. S. 31 3

Baggett v. Bullitt
377 U. S. 360, 375-379 ..... 3, 30, 33, 34, 35

Barnette v. West Virginia
47 F. Supp. 251, 253 (affirmed 319 U. S. 624) 14

Beilan v. Board of Education
357 U. S. 399 15

Brinkerhoff-Faris Trust & Savings Co. v. Hill
281 U. S. 673 19

Cantwell v. Connecticut
310 U. S. 296, 303-304 21

Chambers v. Florida
309 U. S. 227 16

Chicago v. Atchison, T. & S. F. R. Co.
357 U. S. 77, 84 33

County of Allegheny v. Frank Mashuda Co.
360 U. S. 185, 188-189, 196-197 (1959) 32, 34

Cramp v. Florida
368 U. S. 278 ..... 3, 15

Crippen v. Pulliam
61 Wash. 2d 725, 730-731, 380 P. 2d 475
(1963) 26, 27, 28

Davis v. Mann
377 U. S. 678, 690 (1964) 35

Dombrowski v. Pfister
380 U. S. 479, 489 (1965) 35

England v. Louisiana State Board of Medical Examiners
375 U. S. 411, 415-516, 421-422, 436
(1964) 25, 26, 31, 33

PAGE

Falbo v. United States
320 U. S. 549, 561 14

Florida Lime & Avocado Growers, Inc. v. Jacobsen
362 U. S. 73 3

Garner v. Board of Public Works
341 U. S. 716 ..... 14, 15

Gault v. Arizona
87 S. Ct. 1428 19

Gerende v. Board of Supervisors
341 U. S. 56 3

Griffin v. County School Board of Prince Edward County
377 U. S. 218, 228-229 (1964) 27, 35

Griswold v. Connecticut
381 U. S. 479 17

Harman v. Forssenius
380 U. S. 528, 534-537 (1965) 31, 35

Harrison v. NAACP
360 U. S. 167 (1959) 25

Hostetter v. Idlewild Bon Voyage Liquor Corp.
377 U. S. 324, 328 (1964) 35

Konigsberg v. California
353 U. S. 252; 366 U. S. 36 15

Lerner v. Casey
357 U. S. 468 15

Louisiana Power & Light v. City of Thibodaux
360 U. S. 25 (1959) 25

Loving v. Virginia
87 S. Ct. 1817 17

McNeese v. Board of Education
373 U. S. 668, 671, 672, 674 (1963) 30, 31, 32, 34, 35

Meredith v. City of Winter Haven
320 U. S. 228, 237, 243 (1943) 32

PAGE

Monroe v. Pope
365 U. S. 167, 183 32
Moore v. Dempsey
261 U. S. 86 19
NAACP v. Alabama
357 U. S. 449 16
NAACP v. Button
371 U. S. 415, 427 33
Nelson v. Los Angeles
362 U. S. 1 15
Palmetto Fire Ins. Co. v. Connecticut
272 U. S. 295 3
Powell v. Alabama
287 U. S. 45 19
Prince v. Massachusetts
321 U. S. 158, 171, 177 (1944) 8, 20, 21, 22, 23, 24
Propper v. Clark
337 U. S. 472, 492 (1949) 34
Railroad Commission of Texas v. Pullman Co.
312 U. S. 496 (1941) 25
Romero v. Weekly
226 F. 2d 399, 400 (9 Cir. 1955) 34
Shelton v. Tucker
364 U. S. 479, 488 ..... 3, 15, 18
Sherbert v. Verner
374 U. S. 398 (1963) 22, 23
Slochower v. Board of Higher Education
350 U. S. 551 ..... 3, 15
Speiser v. Randall
357 U. S. 513, 525 ..... 3, 15, 33
Sweezy v. New Hampshire
354 U. S. 234 ..... 3, 15
Thompson v. Louisville
362 U. S. 199 19

PAGE

Falbo v. United States
320 U. S. 549, 561 14

Florida Lime & Avocado Growers, Inc. v. Jacobsen
362 U. S. 73 3

Garner v. Board of Public Works
341 U. S. 716 ..... 14, 15

Gault v. Arizona
87 S. Ct. 1428 19

Gerende v. Board of Supervisors
341 U. S. 56 3

Griffin v. County School Board of Prince Edward County
377 U. S. 218, 228-229 (1964) 27, 35

Griswold v. Connecticut
381 U. S. 479 17

Harman v. Forssenius
380 U. S. 528, 534-537 (1965) 31, 35

Harrison v. NAACP
360 U. S. 167 (1959) 25

Hostetter v. Idlewild Bon Voyage Liquor Corp.
377 U. S. 324, 328 (1964) 35

Konigsberg v. California
353 U. S. 252; 366 U. S. 36 15

Lerner v. Casey
357 U. S. 468 15

Louisiana Power & Light v. City of Thibodaux
360 U. S. 25 (1959) 25

Loving v. Virginia
87 S. Ct. 1817 17

McNeese v. Board of Education
373 U. S. 668, 671, 672, 674 (1963) 30, 31, 32, 34, 35

Meredith v. City of Winter Haven
320 U. S. 228, 237, 243 (1943) 32

	PAGE
Monroe v. Pope 365 U. S. 167, 183	32
Moore v. Dempsey 261 U. S. 86	19
NAACP v. Alabama 357 U. S. 449	16
NAACP v. Button 371 U. S. 415, 427	33
Nelson v. Los Angeles 362 U. S. 1	15
Palmetto Fire Ins. Co. v. Connecticut 272 U. S. 295	3
Powell v. Alabama 287 U. S. 45	19
Prince v. Massachusetts 321 U. S. 158, 171, 177 (1944)	8, 20, 21, 22, 23, 24
Propper v. Clark 337 U. S. 472, 492 (1949)	34
Railroad Commission of Texas v. Pullman Co. 312 U. S. 496 (1941)	25
Romero v. Weekly 226 F. 2d 399, 400 (9 Cir. 1955)	34
Shelton v. Tucker 364 U. S. 479, 488	3, 15, 18
Sherbert v. Verner 374 U. S. 398 (1963)	22, 23
Slochower v. Board of Higher Education 350 U. S. 551	3, 15
Speiser v. Randall 357 U. S. 513, 525	3, 15, 33
Sweezy v. New Hampshire 354 U. S. 234	3, 15
Thompson v. Louisville 362 U. S. 199	19

MISCELLANEOUS CITATIONS

	PAGE
Townsend v. Sain 372 U. S. 293, 312	33
Turner v. Memphis 369 U. S. 350, 352-353 (1962)	35
Turney v. Ohio 273 U. S. 510	19
United States v. Robel 88 S. Ct. 419, 424	17, 37
United States v. Seeger 380 U. S. 163, 170	21
United States ex rel. Accardi v. Shaughnessy 347 U. S. 260	19
West Virginia v. Barnette 319 U. S. 624, 642	3, 14, 16
Wieman v. Updegraff 344 U. S. 183	3, 15

MISCELLANEOUS CITATIONS

Bible, Holy Leviticus 17:10	10
Acts 15:29	10
21 Columbia University Quarterly 253, 269 (1919), "The Conscientious Objector"	21
80 Harvard Law Review 604, 606, "Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era"	34
80 Harvard Law Review 1395-1396, Gianella, "Religious Liberty, Non-establishment, and Doctrinal Development, Part I"	22
Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F. R. D. 481, 487 (1959)	31
R.C.W., Chapter 13.04	28, 29, 33

MISCELLANEOUS CITATIONS (*continued*)

	PAGE
R.C.W. 13.04.010(12)	4, 5, 26, 27, 28, 29
R.C.W. 13.04.095	4, 5
Rules of the Supreme Court of the United States	
Rule 15	1
Rule 15(1) (h)	2
28 U.S.C. 1253	2
28 U.S.C. 1343(3)	2
28 U.S.C. 1343(4)	2
28 U.S.C. 2201	2
28 U.S.C. 2281	2, 3
28 U.S.C. 2284	2
42 U.S.C. 1983	2, 30
42 U.S.C. 1988	2
United States Constitution	
Article I, Sections 9, 10	8, 15, 20, 36
Amendment I	5, 15, 16, 19, 20, 36, 37
Amendment IV	6, 15, 20, 36
Amendment V	6, 7, 9, 15, 36
Amendment VIII	7, 15, 20, 36
Amendment IX	7, 15, 20, 36
Amendment XIV	5, 7, 9, 15, 16, 19, 20, 36
Appendix	1a
Memorandum decision of trial court, June 8, 1967	1a
Addendum to memorandum decision of June 8, 1967 (November 20, 1967)	10a
Opinion of trial court, November 20, 1967	22a
Findings of fact and conclusions of law, November 20, 1967	45a
Judgment, November 20, 1967	81a

Supreme Court of the United States

OCTOBER TERM, 1967

No.

JEHOVAH'S WITNESSES in the State of Washington, et al.,

Appellants,

vs.

KING COUNTY HOSPITAL UNIT NO. 1 (Harborview), et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

STATEMENT AS TO JURISDICTION

Appellants submit herewith their jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION

The opinion of the District Court is not reported. Copies of all relevant opinions and decisions and the findings of fact and conclusions of law are appended hereto in accordance with the requirements of Rule 15(1)(h) of the Rules of the Supreme Court of the United States. See *infra*, pp. 1a-81a.

GROUNDS FOR INVOKING JURISDICTION

(i) *Nature of the proceedings and the statute pursuant to which it is brought.*

This case is a suit for injunctive and declaratory relief brought pursuant to the following statutes:

(a) Section 1343(3) and section 1343(4), Title 28, United States Code;

(b) Sections 1983 and 1988, Title 42, United States Code;

(c) Section 2201, Title 28, United States Code;

(d) Sections 2281 and 2284, Title 28, United States Code.

(ii) *The judgment appealed from.*

The three-judge federal District Court for the Western District of Washington, Northern Division, rendered judgment dismissing this action on the merits on November 20, 1967. (R. 953) [1]

The notice of appeal was filed in the District Court for the Western District of Washington, Northern Division, on December 19, 1967. (R. 960)

(iii) *This Court has jurisdiction pursuant to 28 U.S.C. Section 1253 and 28 U.S.C. Section 2281.*

28 U.S.C. §1253 reads as follows:

"Direct appeals from decision of three-judge courts.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

[1] Numbers herein within parentheses preceded by "R." refer to pages of the original record filed in this Court.

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."—June 25, 1948, ch. 646, 62 Stat. 928.

28 U.S.C. §2281 reads as follows:

"2281. Injunction against enforcement of State statute; three-judge court required.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title."—June 25, 1948, ch. 646, 62 Stat. 968.

(iv) *Cases which sustain jurisdiction.*

Palmetto Fire Ins. Co. v. Connecticut, 272 U. S. 295
West Virginia v. Barnette, 319 U. S. 624
Gerende v. Board of Supervisors, 341 U. S. 56
Adler v. Board of Education, 342 U. S. 485
Wieman v. Updegraff, 344 U. S. 183
Sweezy v. New Hampshire, 354 U. S. 234
Slochower v. Board of Higher Education, 350 U. S. 551
Shelton v. Tucker, 364 U. S. 479
Florida Lime & Avocado Growers, Inc. v, Jacobsen, 362 U. S. 73
Speiser v. Randall, 357 U. S. 513
Cramp v. Florida, 368 U. S. 278
Bailey v. Patterson, 369 U. S. 31
Baggett v. Bullitt, 377 U. S. 360

(v) *State statute whose validity is invoked.*

R.C.W. 13.04.010(12) of the Juvenile Court Law of the State of Washington provides:

> *"Juvenile court law—Dependent and delinquent children defined—Wards of state.* This chapter shall be known as the 'Juvenile Court Law' and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for, or contribute to, the delinquency or dependency of such children.
>
> "For the purpose of this chapter the words 'dependent child' shall mean any child under the age of eighteen years: • • •
>
> "(12) Who is grossly and willfully neglected as to medical care necessary for his well-being."

R.C.W. 13.04.095 provides:

> *"Commitment of child—Order of court—Powers of department of institutions—Order rescinded when reformation complete.* When any child shall be found to be delinquent or dependent, within the meaning of this chapter, the court shall make such order for the care, custody, or commitment of the child as the child's welfare in the interest of the state require. Subject to further order, the court may commit the child:
>
> "(1) To the care of such child's parents, subject to supervision of the probation officer; or
>
> "(2) To the custody of a probation officer, subject to such conditions as the judge may impose; or
>
> "(3) To a reputable citizen or association able and willing to receive and care for such child; or
>
> "(4) To an appropriate private agency authorized to care for such children; or
>
> "(5) To the department of public assistance; or
>
> "(6) To the department of institutions.

"In no case shall a child be committed beyond the age of twenty-one years. A child committed to the department of institutions shall be subject to the supervision and control thereof and the department shall have the power to parole such child under such conditions as may be prescribed.

"The department of institutions shall have the power to discharge such child from custody, and the court shall have the power to rescind the commitment of such child, whenever his or her reformation shall be deemed complete."

QUESTIONS PRESENTED

A. Whether the Juvenile Court Act of the State of Washington (R.C.W. 13.04.010(12) and R.C.W. 13.04.095) is, as construed and applied to appellants, repugnant to the Constitution of the United States and in violation of the due process clause of the Fourteenth Amendment in abridging the constitutional guarantees and freedoms hereinafter enumerated:

(*First Amendment*)

1. Free exercise of religion including the right to choose the type of medical treatment compatible with the Christian conscience of the individual and family head.

2. Free exercise of religion in that the father of the family has the Christian right and duty to care for and guide the course of life to be followed within the family circle under his jurisdiction and to decide on the education, upbringing and care, including medical care that he can conscientiously accept for himself and his family.

3. By establishing a religion through unlawful application and enforcement of the impugned statute whereby the power of the state is employed to force upon appellants the ethical-religious views of appellees who believe that consuming human blood is a proper and acceptable practice.

4. By depriving appellants of freedom of association in that they, other persons of the same faith, and all other persons who may be interested in Jehovah's Witnesses will be subject to the custom or usage of the appellees discriminating against appellants and removing their children from custody and care of their parents because such parents do not conform to the views of the majority.

(*Fourth Amendment*)

5. Appellants are denied the right to be free in person against unreasonable seizures by appellees acting in concert under color of law, seizing the children of appellees without trial and subjecting them to the medically dangerous practice of organ transplant commonly called blood transfusion which parents regard as medically harmful and religiously prohibited.

6. That the announced policy of appellee state judges that they will order seizure of the children of appellants any time it is requested by the other appellees is an abridgment of the right of appellants and their families to be secure in their persons and such pronouncement of judicial policy is a general warrant of seizure against Jehovah's Witnesses as a class, and a violation of the Fourth Amendment.

(*Fifth Amendment*)

7. Appellants are denied due process of law in that they are, on account of their religion, denied freedom to contract for the services of a physician. Appellees acting in concert under guise of law force upon appellants and their children dangerous and inadvisable medical treatment, denying to appellants freedom to choose and contract at will.

8. Appellants are denied due process of law in that both children and adults have had blood transfusions forced upon them by the state courts in cavalier, *ex parte* proceedings often without notice, without counsel, or even the knowledge of the persons whose rights were being destroyed.

The state court proceedings have not even pretended to grant due process of law or a meaningful hearing, wherefore such proceedings are in law a nullity. Yet the District Court has treated such state proceedings as being conclusive and binding and not subject to any review. In the result the District Court has approved and consolidated the total denial to appellants of the rights guaranteed by the Fifth Amendment.

(*Eighth Amendment*)

9. The right to be free from cruel and unusual punishment in that sick children, needing the care and protection of their parents, are seized by appellees without meaningful hearing solely because the parents have exercised their right of choice and parental discretion in the interests of their children. Said children have been subjected to the dangerous and objectionable practice of consuming human blood, an assault and shock to their bodies, an outrage to the conscience of parent and child alike and an invasion of family privacy.

(*Ninth Amendment*)

10. The right to be free from invasion of family privacy and denial of the right of parental control of the care and upbringing of children, a right that was retained by the people from the common law of England and is preserved to the appellants by virtue of the Ninth Amendment.

(*Fourteenth Amendment*)

11. The right to be free in the enjoyment of the privileges and immunities guaranteed to citizens of the United States, of freedom to worship Almighty God, Jehovah, and to abide by his instruction to "abstain from blood," and to be allowed to raise their children in peace without interference by state officials in making of decisions which are within the family circle and consequently within the area of parental discretion.

(*Article 1, Sections 9 and 10, United States Constitution*)

12. The right to be free from a Bill of Attainder in that appellee state judges have announced in advance their purpose and intent to order the seizure of any child of Jehovah's Witnesses whenever a parent shall refuse a blood transfusion recommended by appellee physicians. Such orders are regularly made without trial or opportunity to call evidence and in spite of the fact that informed medical opinion is aware that there are always alternative remedies, equally effective and less dangerous.

13. The right to be free from domination by a privileged class having a "title of nobility," namely, the medical profession, who have been granted a privileged position above both the judiciary and the Constitution. Appellee state judges have abandoned their judicial function and allowed the physicians to become judges in their own cases by granting every request of such physicians without a semblance of a fair trial. In fine appellants are not getting fair and equal treatment before the law but are being subjected to oppression and domination by a privileged class, which class is given a superior position, a "title of nobility" forbidden by the Constitution.

B. Questions relating to the Juvenile Court Act of the State of Washington, *supra,* as construed by the District Court:

1. Whether the District Court, in determining that the act was constitutional as applied to appellants under *Prince* v. *Massachusetts,* 321 U. S. 158, thus deciding the case on the merits, can then seek shelter from its own decision by retreating to the equitable abstention doctrine "in case *Prince* is not dispositive of the main action." In short, can the District Court decide the case on the merits, then be heard to say it had no right to so decide?

2. Whether the District Court, in determining that the act was constitutional as applied to appellants, properly

rested its decision upon state court decisions, which were *ex parte* with total disregard for due process and fair hearing as required by the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and which state court decisions were an absolute nullity; in consequence of which has the District Court founded its decision on that which is a nullity at law?

3. Whether the District Court, in determining that the act was constitutional as applied to appellants, and in holding that "according to the overwhelming weight of nonsectarian medical opinion the lifesaving value of blood transfusion far outweighs the risks involved," ignored the overwhelming weight of testimony at the trial of the case.

4. Whether the District Court, in determining the act was constitutional as applied to appellants, properly refused to admit on the trial of the case competent medical authorities (learned treatises), which appear in the record as "Offers of Proof," and which would have demonstrated the error of the view adopted by the District Court.

5. Whether the District Court, in determining that the Act was constitutional as applied to appellants, overrode basic constitutional guarantees without a clear showing of compelling and overriding public interest.

STATEMENT OF THE CASE

Appellants filed a complaint on November 15, 1965, in the United States District Court for the Western District of Washington, Northern Division, under the Civil Rights Act to redress the deprivation of their rights of family privacy, religion and conscience by appellees purporting to act on the basis of the Juvenile Court Act of the State of Washington which is alleged to be unconstitutional as construed and applied. (Final pretrial order R. 692.)

A three-judge court was empanelled to hear the case which was tried June 19, 20 and 21, 1967. (Tr. 1 R. 883-886)[2]

The essence of this case is that appellants, Jehovah's Witnesses, are respectable and conscientious family people whose religious liberty and family privacy are being systematically invaded and interfered with by appellees who are chiefly state judges, physicians and hospital officials. (R. 897)

Appellants object on moral and religious as well as medical grounds to the practice of organ transplant commonly known as transfusion of blood. The introduction of such foreign tissue into the bloodstream of the infant and adult plaintiffs is a violation of the Biblical injunction to 'abstain from blood' (Acts 15:29) and 'no soul of you should eat blood' (Leviticus 17:12). Additionally, the practice of blood transfusion is a dangerous and overrated medical therapy that is being employed slavishly and uncritically without any rules for guidance. (Tr. 100, 115, 190, 209, 210; D. 21, 22)[3] The practice is responsible for many thousands of deaths annually, facts which have not been revealed to the state judges. (Tr. 190, 191; R. 913) There are always alternative remedies acceptable to the parents which could be used without these repeated violations of individual rights. (Tr. 111, 112, 121)

[2] Numbers herein within parentheses preceded by "Tr." refer to official transcript of the proceedings in trial court, filed in this Court.

[3] Deposition taken, after trial by order of trial court on behalf of appellees, of Dr. Eloise Rosalee Giblett, filed in this Court.

In no case in the state courts has there been anything even resembling a fair hearing. In no case has there been any counsel present for the parents or any opportunity to call witnesses or to controvert the testimony of the applicants. One "hearing" was conducted by the judge *after* blood had been administered. (R. 669, 946)

In the case of Loren Hardy the so-called "hearing" consisted of a telephone call from the doctor to the judge and an oral order made over the telephone. All the parents received was a telephone call from the judge advising the father that custody of his son was being removed from him. (R. 948; Tr. 275)

In five out of ten child cases and one out of the two adult cases the patients recovered without having ever been given any blood, although the doctors had testified to its essentiality and the judge had ordered custody removed from the parents. (R. 901) Even the Attorney General of Washington admitted "perhaps all the formality of due process . . . have been necessarily overlooked." (Tr. 493) See also analysis of above by trial Court. (R. 913)

In the case of Martha Ridge, an adult woman, she first learned through a radio broadcast that a "hearing" had been held the previous day unknown to her and she had been placed in custody of a stranger. (Tr. 293)

Appellee Judge Leahy has an announced policy of granting *ex parte* oral orders to remove children of Jehovah's Witnesses from control of their parents any time a physician testifies a blood transfusion is required. (R. 683)

Despite the unsatisfactory nature of the state court proceedings, the District Court has relied on them as making a conclusive finding against appellants, which the District Court declined to review. (R. 896)

Blood transfusion, a form of organ transplant, is a dangerous therapy of disputed medical value. (R. 914) Appellants do not want it for themselves or their children.

(R. 913, 914) They are lawfully exercising their parental discretion and there is no proper basis for interference with their families.

The minority group represented by appellants is being subjected to a consistent publicly acknowledged policy of interference with its religious and family liberty. This is regularly done without a semblance of a trial.

Appellees have taken the position that the State has *parens patriae* authority over neglected children. (R. 693) If a physician asserts that certain medical treatment is essential for the health of the child then the state through its judicial arm has the right and duty to order such treatment over the objections of the parent. (R. 693-695)

Appellees further contend that blood transfusion is a standard type of medical therapy which saves many lives; the lives of some of the infant plaintiffs have been saved by the court-ordered treatment; (R. 694) the state judges have come to a decision after a hearing and have had a valid factual and legal basis for the orders made pursuant to the Juvenile Court Act of the State of Washington. (R. 693-695)

WHY QUESTIONS ARE SUBSTANTIAL

I.

The questions presented by this appeal are substantial in that they raise for the first time several basic constitutional issues respecting the power of a state to invade the sanctity of respectable and conscientious families solely because the parents differ with state officials as to what is beneficial for their children.

Home life in these United States has suffered in recent years and a rising tide of delinquency has resulted. Is it now considered to be within the power of the state acting through its officers to violate the family's deeply-held religious convictions and to destroy at whim and without a meaningful hearing the family privacy of those whose opinions do not happen to conform with those of the state officers?

Who decides what medical treatment will be acceptable —the state or the parents? Other religious groups besides Jehovah's Witnesses disagree with certain medical practices —this problem has wide-ranging implications. Have state experts now supplanted parents in decisions for welfare of the children? Has parental authority reached a terminal point? Do doctors henceforth operate, amputate, sterilize, abort, experiment, transplant organs and use other people's children at will without the parents' having any right of decision over the welfare of their offspring? Has the United States reached the point where 'Big Brother knows best' and citizen-parents no longer have any discretion in the care to be given their own children?

In all the state court decisions challenged herein the officials have said the magic word "emergency" and succeeded in avoiding a fair trial *in every single case.* Have the constitutional guarantees ceased to operate simply because the most powerful elements in the community are attacking an unpopular minority whose views are not generally accepted or even understood? Appellees *know* they

are right: consequently, in their eyes, it would be useless and wasteful to grant a hearing to or consider the rights of the minority whose rights are being trampled.

The cavalier haste of the majority in its effort to crush a minority that will not conform is as old as the history of religious persecution.

It was well stated by Judge Parker in *Barnette* v. *West Virginia,* 47 F. Supp. 251, at 253 (affirmed 319 U. S. 624):

"There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare. * * * The religious freedom guaranteed by the First and Fourteenth Amendments means that he shall have the right to do this, whether his belief is reasonable or not, without interference from anyone, so long as his action or refusal to act is not directly harmful to the society of which he forms a part."

This case involves the most powerful elements in the state, uniting against a minority that dares disagree with the currently accepted point of view: all the elements leading to harsh, unthinking oppression are present in this case; justice demands the intervention of this Court. Appellants remind the Court of the compelling language of the late Mr. Justice Murphy discussing this same minority:

"The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination." (Dissent in *Falbo* v. *United States,* 320 U. S. 549, 561)

The problems posed here are of even more pressing and compelling urgency and importance than those considered by this Court on appeal in cases involving the effort of the state to override fundamental constitutional freedoms under a state program of promoting patriotism and loyalty. (*West Virginia* v. *Barnette,* 319 U. S. 624; *Garner* v. *Board*

of Public Works, 341 U. S. 716; *Adler* v. *Board of Education,* 342 U. S. 485; *Wieman* v. *Updegraff,* 344 U. S. 183; *Slochower* v. *Board of Higher Education,* 350 U. S. 551; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Beilan* v. *Board of Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468; *Speiser* v. *Randall,* 357 U. S. 513; *Nelson* v. *Los Angeles,* 362 U. S. 1; *Shelton* v. *Tucker,* 364 U. S. 479; *Konigsberg* v. *California,* 353 U. S. 252 and 366 U. S. 36; In re *Anastaplo,* 366 U. S. 82; and *Cramp* v. *Florida,* 368 U. S. 278) The constitutional questions here presented have never been considered and set at rest by this Court. Cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234 and *Garner* v. *Board of Public Works,* 341 U. S. 716.

In the above cases, the basic contentions were denial of First Amendment freedoms, made applicable to the states by the Fourteenth Amendment. This Court upheld such fundamental constitutional freedoms as against the demands of the state that it had a compelling interest sufficiently strong to justify overriding these cherished liberties. The case now before this Court goes far beyond the First Amendment freedoms and raises as a bar to the state action involved rights under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments, as well as under Article 1, Sections 9 and 10, United States Constitution, rights which, in the context of this case, have never been presented to or adjudicated by this Court.

As to questions here presented, the United States District Court, Western District of Washington, Northern Division, upheld the state statute as construed and applied to appellants against serious and substantial claims that they were, and are, repugnant to the hereinabove-enumerated provisions of the United States Constitution. The validity of each of these claims and the substantial nature of the issues raised in this appeal are considered below. The questions will be discussed seriatim.

II.

The court below upheld the validity and constitutionality of the Juvenile Court Act of the State of Washington, as applied to appellants and their minor children, by forcing on them the objectionable and dangerous medical therapy of transfusing human blood under the pretended authority of state court decrees hastily granted without a meaningful hearing, thereby depriving appellants and their children of free exercise of religion, freedom of association, freedom from establishment of religion, without due process of law in violation of the First and Fourteenth Amendments to the United States Constitution.

In *West Virginia* v. *Barnette,* 319 U. S. 624, 642, in reply to those who would stifle and infringe upon the free exercise of religion, including, certainly, freedom of association, and foist upon others an establishment of religion, this Court very pointedly spoke:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

The fact that the officials involved in the present case are judges should not insulate them from the foregoing prohibition.

Traditionally and historically, the people of this nation bear and have sworn eternal hostility toward every form of oppression and tyranny over the mind and body of man, including, emphatically, little children. This is true in the realm of conduct or acts as in conscience. (*West Virginia* v. *Barnette, supra; Chambers* v. *Florida,* 309 U. S. 227) This was the basis of the Emancipation Proclamation, to free men, including their children, mentally and physically, from domination by others. As free men the citizens of the United States also have full freedom of association for all lawful purposes, even including Communism.—*NAACP*

v. *Alabama*, 357 U. S. 449; *United States* v. *Robel*, 88 S. Ct. 419, 424.

But how can it be thought that people are free from tyranny when their children, their most precious possession, can be snatched away on a pseudo-hearing and subjected to treatment known to cause many thousands of deaths annually? The record shows there are always alternatives to the treatment of blood transfusion. When and if parents get the child back they remain in a state of continuing concern over the effect of strange blood in the child. (Tr. 285)

In *Griswold* v. *Connecticut*, 381 U. S. 479, this Court held that the intimacy of marriage is insulated from state interference. In a concurring opinion Justice Goldberg said:

"The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. . . .

"The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so."

In *Loving* v. *Virginia*, 87 S. Ct. 1817, Chief Justice Warren, speaking for the Court, struck down the state statute interfering with free choice of a marriage mate, stating: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free man."

If marriage itself is insulated by the Constitution against state interference, then by the same token, the fruits of marriage, the children born, are equally protected against interference by the state, in order that the sanctity of the family circle may remain inviolate.

Appellants wish to make it clear that they do not dispute the right of the state to employ its *parens patriae* powers to care for children whose parents have abandoned them or who are wicked and unnatural parents seeking to damage their children.

The state can take over when the parents abandon. But how can this state power apply here when the parents do not abandon and indeed the Attorney General of Washington admits that "we concede that they are good parents"? (Tr. 498)

The state has power to cancel the license of a person who drives recklessly. The state power over drivers' licenses is established. It does not follow, however, that the state can cancel the license of a person who drives carefully. The state can remove children of bad parents who do not care for them: does it follow the state can remove the children of good parents who do care for them? The existence of the doctrine of *parens patriae* does not prove it can be applied with total disregard for its purposes and limitations.

It is the duty of state government and of state officials to exercise their legitimate functions in a way that will cause the least interference with cherished liberties.

As was stated by this Court in *Shelton* v. *Tucker*, 364 U. S. 479, at page 488:

"In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. . . . The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Thus it is clear from the record in this case that there were less drastic alternatives to the judicially enforced blood transfusion which would not have made an all-out

assault on First and Fourteenth Amendment liberties, but would have left appellants free in the exercise of their religion, free to associate with others of the same religious persuasion and free from the establishment of religion, to wit, the enforced orthodoxy of the medical opinion of doctors and the judicial authority of the state.

Time and time again this Court has held that a state must achieve its lawful aims by enactments with the very minimum encroachment on First and Fourteenth Amendment freedoms. The Juvenile Court Act involved here, as construed and applied by the state and federal District Court, falls far short of meeting this constitutional test. The act therefore, as construed and applied to appellants, binds the free exercise of religion, freedom of association and freedom from establishment of religion with unconstitutional fetters.

Compounding and aggravating these unconstitutional restraints is the absence of any fair hearing in the procedure prior to the obtaining of state court decrees. This circumstance alone makes strong the substantiality of the whole range of questions raised by appellants.

In numerous cases this Court has shaken down the bad fruits of judicial proceedings, civil and criminal, resulting from pseudo-hearings as contravening due process of law. See *Moore* v. *Dempsey,* 261 U. S. 86 (mob-dominated trial); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673 (no real trial of issues in a civil suit); *U. S.* ex rel. *Accardi* v. *Shaughnessy,* 347 U. S. 260 (immigration board failed to exercise its statutory discretion due to acts of attorney general); *Turney* v. *Ohio,* 273 U. S. 510 (pecuniary interest of judge in result of trial); *Powell* v. *Alabama,* 287 U. S. 45 (court-appointed counsel found not to have been adequately representing defendant); *Thompson* v. *Louisville,* 362 U. S. 199 (lack of evidence made conviction of a denial of due process); *Gault* v. *Arizona,* 87 S. Ct. 1428.

Again, the facts and circumstances hereinabove, in the face of the sky-high wall erected by this Court to protect persons in their life, liberty and property against the endless assaults upon the fortress of due process, argue with unimpeachable force the substantiality of the questions here presented.

III.

Actions of the appellees as officers of the State of Washington acting under color of law in seizing and removing from parents their own children is a violation of appellants' rights under the Fourth Amendment to be free in person from unreasonable seizure; their Eighth Amendment right to be free from cruel and unusual punishment; their Ninth Amendment right to be protected in their family privacy and family circle; their constitutional immunity from a Bill of Attainder under Article 1, Sections 9 and 10; and their constitutional right to be free from domination by a privileged class, medical doctors, unconstitutionally given a privileged position as a "title of nobility."

What was said in the discussion under the caption dealing with First and Fourteenth Amendment rights and freedom is equally applicable to those rights and freedoms which appellants assert under Amendments 4, 8, 9, and Article I, Section 10, paragraph 1, United States Constitution. Where not specifically made applicable to the states by their very language, they are so made by the due process clause of the Fourteenth Amendment. For the sake of brevity and to avoid needless repetition, such discussion is incorporated herein and made part hereof by reference. (Supra, pp. 16-20)

IV.

Did the District Court properly rely on *Prince* v. *Massachusetts*, 321 U. S. 158, then rightly take refuge in the equitable doctrine of abstention, should it be held *Prince* was not a proper basis on which to rest its decision?

A. Prince is not applicable to the case at bar and Prince is in any event of dubious authority in the light of other recent decisions.

In its opinion dismissing appellants' case, the trial court said: "It appears to us that the holding of *Prince* is applicable here and that our special three-judge court is bound by that decision." (R. 904) From the *Prince* case the trial court tolled even louder the ringing phrase therein to justify its opinion of dismissal: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children . . ." (R. 904)

The foregoing expression may be interesting literature but it does not represent the *ratio decidendi* of the *Prince* decision. The trial court has picked this sentence, disregarding the fact that the *Prince* problem and the law of that case have no real application to the problem at bar.

It has been suggested that while freedom to believe is absolute, freedom to act is not. (*Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304) This theory should be reexamined to see where it is leading because, if the protection of the Constitution is drawn too narrowly, the result may be that the protection would become meaningless and ineffective.

Appellants' case rests first of all on the assertion that the freedom of an individual to obey the dictates of his conscience is a value so important and so deeply embedded in our history that it should not be interfered with unless clearly necessary for the protection of other individuals and the preservation of society. As stated by Harlan Fiske Stone, later Chief Justice, in The Conscientious Objector, 21 Columbia University Quarterly, 253, 269 (1919), and quoted in *United States* v. *Seeger*, 380 U. S. 163 at page 170: "both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-

preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."

Appellants' case rests secondly on the principle that recognition and preservation of the "family" as the foundation of society and as an essential to the enrichment of individual life is equally significant and vital.

Appellees' actions in compelling blood transfusion strike deeply into the integrity of appellants' family life. And these actions are taken without any showing of a danger to the state.

Dissenting in *Prince* v. *Massachusetts,* 321 U. S. 158, 177, (1944), Mr. Justice Jackson stated: "My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

The standard enunciated by Mr. Justice Jackson, appellants suggest, sets forth both the proper limitation on governmental power to interfere with individual liberty and a standard for protecting the free exercise of religion which is consistent with the attitude expressed by the Court in such recent cases as *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

Indeed, one commentator has stated that the majority opinion in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), "seems to clash with the mood expressed in *Sherbert*" and is, therefore, now vulnerable to being overruled. Gianella, "Religious Liberty, Non-establishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee," 80 Harv. L. Rev. 1395-1396.

Whether or not *Prince* is ultimately to be overruled, the majority opinion expressly limits that case to its facts and

disavows that it lays any foundation or establishes any standard for state interference with religion in the name of children's health. *Prince* v. *Massachusetts,* 321 U. S. 158, 171. By its own statement it relates only to regulation of the public proclaiming of religion on the streets. Arguably, at least, *Prince* could be justified as sustaining the power of the state to regulate in a nondiscriminatory manner, the uses of its public streets for the preservation of public safety, peace or order, a matter which does affect the general public, as distinguished from the personal health of an individual which does not.

That the Court has now adopted the rule that the conduct prohibited must constitute a threat to the safety, welfare or health of others is shown by its statement in *Sherbert* v. *Verner,* 374 U. S. 398; 402-403: "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso* v. *Watkins,* 367 U. S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities. *Fowler* v. *Rhode Island,* 345 U. S. 67; nor employ the taxiing power to inhibit the dissemination of particular religious views. *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573; cf, *Grosjean* v. *American Press Co.,* 297 U. S. 233. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfield* v. *Brown,* 366 U. S. 599, 603. *The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.* See, e.g., *Reynolds* v. *United States,* 98 U. S. 145; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Prince* v. *Massachusetts,* 321 U. S.

158; *Cleveland* v. *United States,* 329 U. S. 14." (Italics added.)

Thus before there can be interference with the exercise of religion, that exercise must be shown to be clearly inimical to the general public interest, not simply harmful to the person who is exercising his religion.

B. After deciding the case on the merits, the trial court committed the dual error of (i) retreating to the doctrine of abstention of its decision on the merits if erroneous and (ii) applying the doctrine of abstention in a situation where it has no proper or permissible application.

The foregoing wholly illogical course of the trial court appears in the record at pages 904-905 of the Record. The trial court below cannot be heard to say that it rules against appellants on the merits, but if the court is wrong it intends to abstain.

Once the trial court made its decision on the merits, relying on the *Prince* case, it cannot be heard at the same time to say if "the Prince case is not dispositive . . . sound judicial administration would warrant the application of the equitable abstention doctrine."

The true judicial answer is short and simple: if the trial court has erroneously relied on *Prince* when *Prince* does not really apply, then "sound judicial administration would warrant" the judgment being reversed, not a retreat to abstention as a means of avoiding correction of the erroneous ruling.

It is patent from the language it has used, that the trial court is both uncertain and doubtful as to the correctness of its decision. The law on such vital questions of constitutional liberty ought not to be allowed to remain in any state of uncertainty. It is imperative that this Court review this cause on the merits with a view to resolving any uncertainties in this important field of family law.

That doctrine, first enunciated by this Court through

Mr. Justice Frankfurter in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941), directs federal courts to postpone decision of cases before this Court until after controlling questions of state law can first be decided by state courts. The high water mark of the doctrine was reached in 1959, in a series of cases including *Louisiana Power and Light* v. *City of Thibodaux*, 360 U. S. 25 (1959), where Mr. Justice Frankfurter wrote: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of *decisive issues of state law.*" (Emphasis supplied.)

The doctrine has never meant abdication of federal jurisdiction, as distinguished from postponement of decision, and it has never been applied except where the outcome of the case hinges on an undecided question of state law. *Harrison* v. *NAACP*, 360 U. S. 167 (1959).

This Court in a later review and summary of the abstention doctrine in *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 416 (1964): "The doctrine contemplates only 'that controversies involving unsettled questions of state law (may) be decided in state tribunals preliminary to a federal court's consideration of the underlying federal questions,' *City of Meridian* v. *Southern Bell Tel. and Tel. Co.*, 358 U. S. 639, 640, 3 L. ed. 2d 562, 563, 79 Ct. 455; 'that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest,' *United Gas and Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134, 135-136, 7 L. ed. 2d 623, 624-625, 82 S. Ct. 676; that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law,' *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105, 89 L. ed. 101, 103, 65 S. Ct. 152; 'that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality,' *Harrison* v. *NAACP*, 360 U. S. 167, 178, 3 L. ed. 2d 1152, 1159, 79 S. Ct. 1025."

The purpose of the doctrine is twofold, (1) to avoid having the federal courts guess at the correct interpretation of a state law; (2) to avoid passing on a federal constitutional question if there can be a construction or limiting interpretation of the state statute by a state court which would eliminate the federal constitutional question.

Even if abstention should be ordered, the primary responsibility for determination of the federal constitutional question is that of the federal court where the jurisdiction of the federal court is invoked. That federal constitutional determination cannot be forced into the state court, thus denying appellants the federal forum provided by statute for adjudication of a claimed denial of federal constitutional rights. The forum of the federal court is available to appellants, and they have chosen it. They need not seek a determination of their federal constitutional claims in any other court. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964).

The only "controlling question of state law" which could arise in this litigation would be in respect to the meaning and applicability of R.C.W. 13.04.010, the State of Washington Juvenile Court Act under which the trial court upheld appellee-judges who have deprived appellants-parents of the custody of their children for purposes of requiring blood transfusions to be given to the children against the religious beliefs and medical discretion of the parents. If that statute were still open to a construction that it did *not* authorize such judicial acts taken against appellants-parents and children, then and only then might there be some basis for arguing that the federal court should abstain until the Supreme Court of Washington had an opportunity to construe that statute.

But R.C.W. 13.04.010 has been construed by the Washington State Supreme Court in *Crippen* v. *Pulliam,* 61 Wash. 2d 725 (1963), 380 P. 2d 475, and that interpretation applied to the facts described in the Findings of Fact of

the trial court does not support the view that R.C.W. 13.04.010 is not to be used to remove the custody of children from parents who refuse blood transfusions for their children. See *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964).

The purpose of the predecessor statute to R.C.W. 13.-04.010 (the same statute as the statute here in litigation in all material respects except for the later addition to a new class of dependent child) was stated in *Crippen* v. *Pulliam,* at 61 Wash. 2d 730-731 as follows: "The paramount purpose and object of the juvenile court act is to provide the court with authority to do those things essential for the moral, physical and mental well-being of minor children. This purpose is as consistent with assisting the parents in controlling the behavior of their children as with *divesting* the parents of their rights as natural guardians. The degree of authority exercised over a "delinquent child" to the exclusion of the parent's rights is dependent upon the wide discretion of the juvenile court in its evaluation of the facts of each case. The parent is therefore left with those rights which are not inconsistent or do not interfere with the specific purposes of the court in adjudging the child a delinquent." (Emphasis in original.)

Crippen was a medical malpractice case and involved the construction of the Juvenile Court Act in effect in 1957. The natural father had given consent to surgery at a time when the child, who later sued for medical malpractice, was a ward of the Juvenile Court. In holding that the father's consent at that time was valid, and that the consent of the Juvenile Court was not thus required (even though the child was a ward of the Court) the Washington State Supreme Court ruled that the Juvenile Court Act confers broad discretionary powers on the Juvenile Court to act for the welfare of the child, to whatever degree may be necessary for that child's moral, physical or mental well-being.

Subsequent to the act so construed in *Crippen* v. *Pulliam, supra,* the Juvenile Court Act was amended in 1961, to add another category of dependent child, one, "(12) Who is grossly and wilfully neglected as to medical care necessary for his well-being."

It is clear that the addition of subsection (12) as another ground for adjudicating a child dependent only made more certain the power of the Juvenile Court to carry out the purposes of the act as enunciated in *Crippen* v. *Pulliam, supra.* Since the 1961 amendment did not change the broad purpose of the Juvenile Court Act or limit the great discretionary powers of the Juvenile Court, there can be little doubt as to the meaning of that 1961 statute, and as to how it would be construed by the Washington State Supreme Court today.

The actions of the Juvenile Court in making children of Jehovah's Witnesses wards of the court are taken under the claim that steps must be taken which are necessary for the physical and mental well-being of the child and which the natural parents have refused to allow. The child is not taken away from the custody of his parents to any greater degree than is necessary for the administration of the blood transfusion. Thus under the reasoning of *Crippen* the parent is merely "assisted" in the medical treatment of the child, but that "assistance" deprives the parent of the power to refuse a form of medical treatment contrary to his religious views and medical discretion.

Thus it was intended by the Washington State Legislature in R.C.W. Chapter 13.04 to give to Juvenile Courts the power to take the actions which have been set out in the findings of fact below. (R. 919; 45a) That being the case, and as construed by the highest court in the State of Washington, there is no question here of an ambiguous state law which should now be construed by state courts.

Moreover, the Washington Juvenile Court Act has already been construed over and over again by the Superior

Courts of the state in Jehovah's Witnesses' blood transfusion cases. Every case relating to a minor cited in the final pretrial order involved the application of R.C.W. 13.04.010 to children alleged to be dependent on the sole ground that their parents would not consent to blood transfusions. In each such instance the state judges who are appellees in this action construed R.C.W. Chapter 13.04 to authorize them to make the children wards of the court and to order blood transfusions over parental objections to that treatment.

In reality there is no *genuine* issue of state law in this case in the sense that the parties dispute the meaning of the statute. Without considering the constitutional questions and which appellants insist be litigated in the federal court, appellants submit that the Washington State Supreme Court to be consistent with its other decisions would necessarily construe R.C.W. 13.04.010 (12) to cover cases where parents of Jehovah's Witnesses refuse consent to blood transfusions claimed to be required to preserve the life and health of their children.

Surely the trial court fell into error in contending that R.C.W. 13.04.010 would be construed by the Washington State Supreme Court so as not to be applicable to Jehovah's Witnesses' blood transfusion cases. The appellee-judges whom the trial court upheld are the very persons who construe the statute to apply to the cases set forth in the final pretrial order. (R. 645) If the abstention doctrine were applied here so that the federal court were to postpone decision of the constitutional questions until a declaratory judgment action could be brought in state court, the only question presented by such an action would be the applicability and meaning of R.C.W. 13.04.010.

What appellees are really asking is to have appellants' constitutional rights adjudicated in state court. Appellants are not required to submit their rights provided by federal statutes to a state tribunal.

C. Even if it were applicable, the doctrine of abstention is discretionary. To apply it to this case would, appellants believe, be an abuse of judicial discretion.

It was stated in *Baggett* v. *Bullitt*, 377 U. S. 360, 375:

"The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exists the 'special circumstances' *Propper* v. *Clark*, 337 U. S. 472, prerequisite to its application must be made on a case-by-case basis."

In footnote 11 at page 375, the Court said: "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. *Shelton* v. *McKinley*, 174 F. Supp. 351 (D. C. E. D. Ark)."

It appears from the foregoing that abstention would be inappropriate in a case such as this where there are no substantial problems of statutory construction and delay would prejudice protection of constitutional rights.

Appellants' cause of action is based upon 42 U. S. C. A. § 1983, a statute with several purposes, as given in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963): "That is the statute [42 USC Sec. 1983] that was involved in *Monroe* v. *Pape, supra;* and we reviewed its history at length in that case. 365 U. S. at 171 et. seq. The purposes were several fold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' (id., 174), and to provide a remedy in the federal courts supplementary to any remedy any State might have. Id., 180-183."

The purposes of Section 1983 would be defeated by a holding that the assertion by appellants of a federal claim

in a federal court (as in this case) must await an attempt to vindicate the same claim in a state court. Thus appellants are entitled to have a federal court pass upon their federal claim that they are being deprived of rights protected by the United States Constitution. *McNeese* v. *Board of Education*, 372 U. S. at 672.

Appellants cannot be compelled to go to a state forum for determination of the federal constitutional questions, for as held in *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 at 415-416: "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied.' *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 40, 53 L. ed. 382, 394, 29 S. Ct. 192, 39 LRA NS 1134. Nor does anything in the abstention doctrine require or support such a result. Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems. *Louisiana P. & L. Co.* v. *Thibodaux*, 360 U. S. 25, 29, 3 L. ed. 2d 1058, 1062, 79 S. Ct. 1070. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." Accord: *Harman* v. *Forssenius*, 380 U. S. 528 (1965); Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F. R. D. 481, 487 (1959).

This emphasis on the duty of federal courts to rule upon questions properly before them also applies in federal diversity cases. *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 243 (1943): "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

To relegate appellants to state court for determination of their federal constitutional rights will penalize them "for their attempt to exercise rights of access to the federal courts granted them by Congress [and would] deny them 'that promptness of decision which in all judicial actions is one of the elements of justice. *Forsythe* v. *Hammond,* 166 U. S. 506, 513, 41 L. ed. 1095, 17 S. Ct. 665.'" *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185, 196-197 (1959). Accord: *Meredith* v. *City of Winter Haven,* 320 U. S. 228, at 237 (1943).

Even the "availability" of a state forum claimed by the trial court is no reason for that court to invoke the doctrine of abstention; the federal remedy here sought by appellants is supplementary to any state relief. The state relief need not be first sought and refused before the federal relief is invoked. *McNeese* v. *Board of Education,* 373 U. S. at 671, relying upon *Monroe* v. *Pape,* 365 U. S. 167, 183.

Any direction of this litigation into the state courts will simply result in delay and in a further protraction of the proceedings commenced in the trial court long ago. It is not as though the federal constitutional issues are

to be decided in the state court, for the only issue before the state court would be the construction or limiting interpretation of the statute in question. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), and cases cited at footnote 11, 375 U. S. at page 416.

At the commencement of this action, now, and in the future, appellants have asked, do, and will ask the federal forum for a determination of facts and will continue to seek a ruling on federal constitutional questions here asserted. Learning from the teaching of *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, even in the event this Court were to order abstention, appellants would submit to the state court only the question of interpretation of R.C.W. Chapter 13.04 and a determination if it applies under the facts as formed by the court below. Appellants would then return to the federal court for disposition of their federal contentions, thus preserving in all events their right to return to the federal forum. So what would be accomplished except delay and further destruction of constitutional rights? *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 at 421-422; *NAACP* v. *Button,* 371 U. S. 415, 427.

Therefore even with abstention invoked, appellants will return to the federal court months or perhaps years from now for a final disposition of the identical federal constitutional issue heretofore presented to the federal court. Abstention here will result only in piecemeal and expensive litigation.—*Baggett* v. *Bullitt,* 377 U. S. 360, 378-379. See also *Chicago* v. *Atchison T. & S. F. R. Co.,* 357 U. S. 77, 84; *Townsend* v. *Sain,* 372 U. S. 293, 312; *Speiser* v. *Randall,* 357 U. S. 513, 525.

Appellants want a determination by judges who operate within the greater independence of the federal court; this is very important in a case such as this involving a controversial emotional issue. See *England* v. *Louisiana State Board of Medical Examiners,* concurring opinion of Mr.

Justice Douglas, 375 U. S. at 436. Thus appellants chose a court presided over by judges appointed by the President of the United States rather than a state court or courts presided over by an elected judge. *Romero* v. *Weekly,* 226 F. 2d 399, at 400 (9 Cir. 1955).

Appellants assert that abstention is a very limited exception to the duty of the federal court to adjudicate this controversy placed before it. See the words of this Court in *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185, 188-189 (1950): "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an *extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.* Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. . . ." (Emphasis added.)

In *Propper* v. *Clark,* 337 U. S. 472 at 492 (1949), the Court asserted that in the absence of special circumstances, abstention is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy. *Propper* v. *Clark* in the foregoing holding relied upon *Meredith* v. *City of Winter Haven,* 320 U. S. at 236-237. *Propper* v. *Clark* was referred to with approval in *Baggett* v. *Bullitt,* 377 U. S. at 375. Mr. Justice Frankfurter dissented to this portion of the decision in *Propper* v. *Clark.*

Should abstention be ruled in this case it means a sacrifice of appellants' rights, and in this case there is no countervailing interest to compel a denial of such right to this forum. See 80 Harv. L. Rev. 604 at 606, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era.

Finally, the abstention doctrine which reached its high water mark in 1959 is now rarely, if ever, applied by the

Court in cases raising important constitutional questions. This Court has held abstention improper in the following recent cases: *Turner* v. *City of Memphis,* 369 U. S. 350, 352-353 (1962); *McNeese* v. *Board of Education,* 373 U. S. 668, 674 (1963); *Davis* v. *Mann,* 377 U. S. 678, 690 (1964); *Baggett* v. *Bullitt,* 377 U. S. 360, 375-379 (1964); *Griffin* v. *County School Board,* 377 U. S. 218, 228-229 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 328 (1964); *Harman* v. *Forssenius,* 380 U. S. 528, 534-537 (1965); *Dombrowski* v. *Pfister,* 380 U. S. 479, 489 (1965).

There is no reason under the facts of this case for the Court to abstain and remit the case to the state court. To do so, appellants earnestly assert, would be an abuse of judicial discretion.

CONCLUSION

It seems very clear from the foregoing outline of the facts and legal considerations that the issues raised here are both novel and substantial. They have never before been before this Court in this context and loudly call for determination.

The questions raised involve both free exercise of worship and freedom from an establishment of religion under the First Amendment; the right to be free from unreasonable searches and seizures under the Fourth Amendment; the right not to be deprived of liberty without due process of law under the Fifth Amendment; the right to be free from cruel and unusual punishment under the Eighth Amendment; the right to be protected in family privacy and to be protected in the common-law rights of the family which antedated the Constitution, all as protected by the Ninth Amendment; the constitutional immunity from bills of attainder and domination by a title of nobility pursuant to Article One, Sections 9 and 10, of the Constitution; and the right under the Fourteenth Amendment to be protected as against the state from abridgment of all the foregoing rights of citizens of the United States.

What is the position of a doctor in relation to the families of other people? Is a doctor a public official or a private citizen? If a public official, what are the controlling rules relating to his decision? If a private citizen, then what right does he have to overrule the right of parental discretion of parents in relation to their own families?

What is the true position of a parent? Does he or does he not have a right to exercise parental discretion as to the treatment to be given his child? If the parent has the right to exercise parental discretion, is this a right to disagree with the professional consultant or merely to rubber-stamp the medical decision? If the parent has a right only to rubber-stamp the medical opinion, how can

it be said there is a power of parental discretion? No decisions in this Court have ever analyzed the limits of parental discretion. What are they?

Would a parental decision be considered reasonable and unimpeachable by law, if based on wholly medical considerations? Is the parental decision on weaker ground if influenced by religious or moral considerations for the welfare of the child? If the answer to the last question is in the affirmative, does it not follow that families are being discriminated against and penalized because of their beliefs? If people can be constitutionally penalized because of their beliefs, then the wall of protection of freedom of religion, which the First Amendment was designed to provide, has instead been turned into a sword of assault on religious liberty.

Especially in this period of organ transplants when many matters of life and death fall to be decided by a physician it is most important and urgent that this Court review and give direction to this nation and the professional men in it as to the balancing social, legal and constitutional considerations that must be taken into account in this entire field of human relations which has been very little analyzed by the courts.

The Court has recently held that even Communists continue to be protected by the right of freedom of association. (*United States* v. *Robel,* 88 S. Ct. 419, 424) Do not religious groups have the same right of official noninterference with their decisions made in good faith according to their best understanding? Do not families, the most intimate and close-knit of human associations, have an equal right of state noninterference with their internal decisions especially in areas where there is no certain solution?

These very fundamental and wide-ranging human issues are now before this Court for consideration and urgently call for the noting of jurisdiction and the careful and perceptive analysis by this tribunal of this entire problem.

Respectfully submitted,

VICTOR V. BLACKWELL
P.O. Box 1180
Covington, Louisiana 70433

DANIEL BRINK
1418 IBM Building
Seattle, Washington 98101

KENNETH S. JACOBS
207 South Villa Avenue
Villa Park, Illinois 60181

W. GLEN How, Q.C.
Of Counsel

APPENDIX

MEMORANDUM DECISION

R. 563

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JEHOVAH'S WITNESSES in the State of Washington, et al.,
Plaintiffs,
vs.
KING COUNTY HOSPITAL UNIT NO. 1 (Harborview), et al.,
Defendants.
} Civil No. 6595

[Filed June 8, 1967]

The Jehovah's Witnesses, a minority religious group; the Watch Tower Bible and Tract Society of Pennsylvania, legal governing agency for the Jehovah's Witnesses; and individually-named Jehovah's Witnesses, including minors as well as adults; have brought the above-entitled action on their own behalf and as a class action on behalf of all Jehovah's Witnesses in the State of Washington. The prayer of the complaint asks that a special three-judge district court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 for the purposes of declaring the legal rights of the plaintiffs and permanently enjoining all defendants, individually and as a class, from administering blood transfusions to plaintiffs in the future, as defendants allegedly have done in the past, in violation of certain constitutional rights of the plaintiffs.

R. 564

The parties defendant are individually-named Superior Court judges, Juvenile Court employees, hospitals and hospital personnel, and physicians; also physicians named as representatives of a class which includes all medical doctors in the State of Washington who are employed in and paid by public institutions operating directly with funds raised entirely or in part from the taxpayers of the State of Washington, or operating under funds granted to said hospitals by the United States government; physicians named as representatives of a class that includes all medical doctors licensed to practice medicine or surgery in the State of Washington; hospitals named as representatives of a class which includes all hospitals in the State of Washington operated by the state, a county, or by any public hospital district; and hospitals named as representatives of a class which includes all licensed hospitals in the State of Washington excepting the type of "public" hospitals immediately referred to.

The state statute challenged as unconstitutional and giving rise to the request for the special three-judge court is the Juvenile Court Act of the State of Washington, R.C.W. 13.04, and more particularly sections 13.04.010(12) and 13.04.095 of said act. Plaintiffs contend that these particular sections of the act on their face and as applied to the plaintiffs are unconstitutional and invalid. The gist of the plaintiffs' complaint is that the defendant Superior Court judges pursuant to their authority under the Juvenile Court Act and upon petitions by the defendant doctors or hospital personnel have taken the children of plaintiffs and removed them from the protection of their parents by having such children declared wards of the court simply because plaintiffs in the exercise of their judgment

R. 565

disagree with the opinions of the defendant physicians and decline to accept blood transfusions for their children.

All defendants have filed and argued motions to dismiss. At the hearing on said motions the court *sua sponte* raised the question of its jurisdiction to hear the case at bar, referred to the decision of the Supreme Court in *Phillips* v. *United States,* 312 U. S. 246 (1941), and requested briefs on the jurisdictional issue. After consideration of the briefs the court has concluded to reserve until a hearing on the merits its ruling on the jurisdictional issue as well as other issues raised by the motions to dismiss the Superior Court judges, the physicians, hospitals, and hospital personnel as to the eight cases set forth in the pretrial order No. 1[1] and the two cases in the supplemental complaint[2] wherein court orders were obtained pursuant to R.C.W. 13.04.010(12), declaring the children of Jehovah's Witnesses wards of the court and permitting blood transfusions to be given to such children.

Before the court for further decision at this time are the motions to dismiss the suit as to the remaining defendants, contentions and issues. The initial issue with respect to these motions is the jurisdiction of a three-judge district court to hear and decide issues related to but in no way directly bearing upon the action challenging on constitutional grounds the application of a state statute.

In pretrial order No. 1 and in the affidavit of Kenneth MacDonald filed for consideration with motion to dismiss for lack of jurisdiction (document 87) plaintiffs delineate four cases[3] wherein the constitutional rights of adult Jehovah's Witnesses are alleged to have been violated, but the contested action was not taken pursuant to the

R. 566

constitutionally-challenged state statute. In the supplemental complaint plaintiffs depict another situation[4] involving an adult Jehovah's Witness for whom a guardian was appointed to consent to a blood transfusion which the patient had refused on religious grounds. This alleged violation of constitutional rights likewise did not occur

from an act based on the challenged state statute. These additional acts plaintiffs claim are actionable constitutional violations under the Civil Rights Act, 42 U.S.C. § 1983. The question is whether the three-judge district court may properly hear questions based on violation of the Civil Rights Act.

The three-judge district court is a statutory creature with a limited sphere of operation. It is an extraordinary court and technical requirements relating to its jurisdiction are to be strictly construed. *Bailey* v. *Patterson,* 369 U. S. 31 (1962); *Gate Film Club* v. *Pesce,* 236 F. Supp. 828 (S.D. N.Y. 1964). Section 2281 of title 28 of the United States Code sets out the jurisdictional limitations binding on a three-judge court: 1) an interlocutory or permanent injunction must be sought; 2) the injunction sought must be one to restrain the action of a state officer or administrative agency; 3) the action sought to be enjoined must consist of the enforcement or execution of a state statute; 4) the injunction must be sought on the ground that the state statute is unconstitutional. Moreover, generally a disputed substantial federal question must be presented. See *Bartlett & Co.* v. *State Corp. Comm. of Kansas,* 223 F. Supp. 975 (Kans. 1963). The statutory requirements for three-judge court jurisdiction are requirements of substance, not of form. See *Wilentz* v. *Sovereign Camp,* 306 U. S. 573 (1939).[5] Thus, it is specifically

R. 567

stated that the questionable action must be taken in the enforcement or execution of a state statute; the acts of the state which are attacked must be based on the constitutionally-challenged statute.

The policy behind the convening of a three-judge court is that a single judge ought not to be empowered to invalidate a state statute under a federal claim. It is significant that in *Swift* v. *Wickham,* 382 U. S. 111 (1965), although in another context, the Supreme Court has recently empha-

sized the restrictive interpretation to be given to section 2281 cases, overruling the court's more liberal holding in *Kesler* v. *Dept. of Public Safety*, 369 U. S. 153 (1962) as to the cases encompassed by the three-judge procedure. In *Wickham* the court notes that "Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, *would render void state statutes* embodying important state policies." (382 U. S. 111, 119; *emphasis added*). Such policy and the limitations of section 2281 must be considered in appraising the additional issues plaintiffs request the three-judge court to determine.

The issue of whether or not conduct of judges, physicians, hospitals, and hospital personnel is actionable under the Civil Rights Act is not germane in determining the jurisdiction of a three-judge court. The fact that a single district court judge would have jurisdiction to hear questions arising under the Civil Rights Act is not determinative of the jurisdiction of a three-judge district court. The claim that constitutional rights have been violated by state action not based upon or taken pursuant to a specific statute is not, under the wording or a reasonable interpretation of the federal statute, sufficient to vest a three-judge court with the authority to consider the claim. As

R. 568

stated previously, the issues properly posed for determination by a three-judge court arise from the enforcement or execution of a state statute, which is claimed to violate constitutional rights. The questions involving the adult Jehovah's Witnesses were not and are not predicated on R.C.W. 13.04, or on any other constitutionally-challenged state statute. Nor is it answer enough to say that because a three-judge court is considering constitutional questions arising from actions taken pursuant to the enforcement or execution of a challenged state statute, such court has "pendant" jurisdiction to hear closely-related matters. This court does not intend to depart from the traditional,

limited construction of three-judge court jurisdiction. The court as a specially convened three-judge court finds no authority to extend its jurisdiction to questions involving the constitutional rights of Jehovah's Witnesses when the alleged constitutional deprivations did not occur from acts taken pursuant to a challenged state statute.

The court therefore dismisses those aspects of the case not based on acts taken in the enforcement or execution of R.C.W. 13.04.010(12) or 13.04.095.

Orders of dismissal in accordance herewith to be submitted by counsel for the various defendants.

DATED June 8 1967.

/s/ Frederick G. Hamley
Frederick G. Hamley
United States Circuit Judge

/s/ William J. Lindberg
William J. Lindberg
United States District Judge

/s/ W. T. Beeks
W. T. Beeks
United States District Judge

FOOTNOTES

[1] Retained in the action until a hearing on the merits are the following parties:

Plaintiffs: Norman C. and Carolyn Maydole and Russell Scott Maydole; and

Defendants: Franklin Kells, M.D.; Donald B. Fager, M.D.; Judge Lawrence Leahy.

Plaintiffs: Laurin and Geraldine Seelye and Bradley Scott Seelye; and

Defendants: Robert F. Miller, M.D.; Judge William G. Long.

Plaintiffs: Clifford and Joyce Burnitt and Thomas Allen Burnitt; and

Defendants: University of Washington Hospital; Loren Winterscheid; Judge William G. Long.

Plaintiffs: Adrian W. and Beatrice Elam and Jeffrey Ward Elam; and

Defendants: Stevens Memorial Hospital, Edmonds, Washington; Donald E. Brown, M.D.; Allen Sola, M.D.; Judge Phillip Sheridan.

Plaintiffs: James and Helen Lawrence and Heidi Jo Lawrence; and

Defendants: University of Washington Hospital; Lloyd Nyhus, M.D.; Carl B. Erickson; Judge Theodore S. Turner.

Plaintiffs: Jack and Hazel Pen and Michael Pen; and

Defendants: Robert A. Aldrich; Warren Guntheroth; John Allen; Judge William G. Long.

Plaintiffs: Olite and Azell Smith and Jeanetter Smith; and

Defendants: King County Hospital Unit No. 1 (Harborview); Robert F. Miller, M.D.; Judge Robert F. Utter.

Plaintiffs: Richard and Bernice Brockman and Sharilyn Brockman; and

Defendants: J. D. Klein, M.D.; Judge Thomas G. Jordan.

R. 570

[2] Also retained are the following parties:

Plaintiffs: Neil and Patsy Nichol and Geri Lynn Nichol; and

Defendants: Lester Sauvage, M.D.; Jack Docter, M.D.; Children's Orthopedic Hospital and Medical Center; Judge Robert F. Utter.

Plaintiffs: Gene and Donna Hardy and Loren Hardy; and

Defendants: Quay Cutshall, M.D.; Children's Orthopedic Hospital and Medical Center; Judge Walter T. McGovern.

[3] The cases involve plaintiffs, Eugene and Jean Alicki; plaintiffs, Joseph G. and Shirley L. Chabot; plaintiffs, Richard D. and Doris Jean Russell; plaintiff, Evonne Sayres.

[4] The case involves plaintiff, Martha Ridge.

[5] The Supreme Court in Wilentz was applying the predecessor to section 2281; the court was asked to decide whether the suit brought met the statutory prerequisites —that is, was it a suit for an injunction "restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission"? (306 U. S. at 579.) In deciding that the case before it was not the kind of case encompassed by the statute, the court noted that the statute

sharply and specifically defined the class of cases for the extraordinary three-judge procedure and jurisdiction could not be extended to include cases not satisfying the stated limitations.

(Footnotes 1 and 2 subject to amendment; counsel to inform court of any omissions or additions of parties in the ten cases still before this court.)

R. 883

ADDENDUM TO MEMORANDUM DECISION OF JUNE 8, 1967

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil No. 6595

[SAME TITLE]

[Filed November 20, 1967]

On June 8, 1967 this court entered its memorandum decision directing dismissal of those aspects of the case which involved only actual or threatened blood transfusion of adults, and reserving until trial of the cause the court's ruling on (1) the jurisdictional issue raised by *Phillips* v. *United States*, 312 U. S. 246 (1941), and (2) motions raised by various defendants for dismissal of the action as to some or all of them. Subsequently plaintiffs filed a motion to reconsider the court's memorandum decision insofar as it dismissed from the case the adult blood transfusion instances involving plaintiffs, Evonne Sayers and Martha Ridge.

First, as to the jurisdictional issue. Troubled by the effect of the holding of the supreme court in *Phillips*,[1] and cognizant of the technical construction given to three-

R. 884

judge court statutes[2] this court *sua sponte* raised the question as to whether the instant case was properly a special three-judge case. Briefs were requested and submitted on the issue. With regard to the latter question, the court finds the present case distinguishable from the *Phillips* case and concludes that this is properly a three-judge court case.

There are two patent distinctions between the *Phillips* case and the one now before us. In *Phillips* the supreme court stated that it was "significant" that plaintiff did not, in its pleadings, specifically attack the constitutionality of the Oklahoma state constitutional provisions and statutes granting the Governor power to call out the National Guard. (See 312 U. S. at 252). In our case the pleadings expressly challenge the constitutionality of the state statutes. In *Phillips* the supreme court characterized that suit as "involving a single, unique exercise" of the powers of the Governor's office. (See 312 U. S. at 253.) In our case, plaintiffs complain of ten or more such acts, extending over a considerable period of time and involving three or more counties.

There is no question but that plaintiffs are purporting to attack statutes of the State of Washington, namely two provisions of the state's Juvenile Court Law, on federal constitutional grounds. The provisions in question, namely RCW 13.04.010(12) and RCW 13.04.095, are of statewide application.

These statutes are also mandatory in form. RCW 13.04.010(12) provides, among other things, that for the purpose of the act the words "'dependent child' *shall* mean any child under the age of eighteen years: * * * (12) who is grossly and wilfully neglected as to medical care necessary

R. 885

for his well-being." (Emphasis supplied) This does not appear to leave any room for an exception in the case of a child who is in fact found to be so neglected, but for religious reasons. RCW 13.04.095 provides that when any child shall be found to be delinquent or dependent, within the meaning of this chapter, the court "shall" make such order for the care, custody, or commitment of the child "as the child's welfare in the interest of the state require."

It is true that this statute does not expressly require a court to order a medically-neglected child made a ward of

the court so that a blood transfusion may be administered. But where the finding of gross and wilful medical neglect is premised upon a finding that a transfusion is necessary to save life there is probably no order other than to require such a transfusion which would discharge the state judge's mandatory duty, under RCW 13.04.095, to "make such order for the care, custody, or commitment of the child as the child's welfare in the interest of the state require."

In more recent litigation courts have held that a three-judge court is required not only where a state statute is challenged as federally unconstitutional on its face, but also "as applied." Thus, in *Idlewild Bon Voyage Liquor Corp.* v. *Rohan*, 289 F. 2d 426 (2 Cir. 1961) it was held at page 428 that the district judge should have convened a three-judge court where the complaint challenged the federal constitutionality of a state statute "because of the way that statute was being applied." And when the same case came before the supreme court *sub nom. Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962) that court stated: "We agree with the court of appeals that a three-judge court should have been convened in this case."

R. 886

In essence, plaintiffs' complaint here is the same: state judges are applying a statewide statute in a federally unconstitutional manner. In view of this, and without regard to the merits of their position, we think plaintiffs should not be denied a three-judge court under the *Phillips* doctrine.

Second, as to the plaintiffs' motion to reconsider the court's memorandum decision insofar as it directs the dismissal from the case of those defendants charged in relation to the blood transfusions authorized to be administered to adult plaintiffs, Evonne Sayers and Martha Ridge. With respect to these plaintiffs but not in the other adult cases, court orders were obtained authorizing compulsory

blood transfusions, contrary to the religious beliefs of the adults. In its decision of June 8, 1967 this court considered and rejected the proposition that it had "pendent" jurisdiction under the three-judge court procedure to determine the questions raised in the adult cases.[6] Because this court regards the three-judge court statute as a limitation on federal jurisdiction, and to be strictly construed, the court must, for the reasons propounded in its earlier decision as well as that stated in footnote 6 herein, deny the plaintiffs' motion to reconsider.

Assuming, however, that this court does have pendent jurisdiction to consider the merits of the constitutional issues raised by the compulsory transfusion of adults, the court, in the discretionary exercise of its equity powers, ought not to accord declaratory relief for the future predicated on two isolated instances. Only one county (King County), and only one superior court judge (Judge Robert F. Utter) were involved in the incidents involving plaintiffs, Evonne Sayers and Martha Ridge, both of which

R. 887

occurred in 1966. Even assuming that the two described instances involved violations of the constitution, and that an equitable remedy is otherwise available from this three-judge court, plaintiffs have not made a sufficient showing as to the probability that incidents of this kind will reoccur.[7]

Third, as to the motions raised by various defendants for dismissal of the action as to some or all of them.[8] Defendants, Donald E. Brown and Alan Sola, have moved for dismissal of the action as to them on the ground that subject matter jurisdiction is lacking as to them. The only transfusion incident in which these two defendants are involved pertains to Jeffrey Ward Elam, minor son of plaintiffs Adrian and Patricia Elam.

This boy was injured in an automobile accident and defendant doctors Brown and Sola at first declined to begin

necessary surgical procedures. They did so because the parents refused on religious grounds to permit a blood transfusion if, in the course of the operation, the doctors decided that this was necessary. However, Judge Phillip Sheridan, a defendant herein, entered an order finding the child a dependent child and authorized a transfusion if Doctors Brown and Sola thought it necessary. The record does not indicate who petitioned the court for such an order. An operation was then performed and the child recovered without the necessity of a transfusion.

Doctors Brown and Sola argue that, under these circumstances they were not acting under color of state law —an essential element under 42 U.S.C. § 1983—and that in any event there was no deprivation of a constitutional right because no transfusion was actually given.

While the parents had consented to an operation it was

R. 888

performed only when the doctors had an order from a state court authorizing a transfusion if the doctors thought it necessary. In our view the doctors were, in these circumstances, acting under color of state law when they performed the operation. While no transfusion was given, the court order was entered and the doctors proceeded with the operation under authority of that order, contrary to the religious objections of the parents.

This was enough to meet the jurisdictional requirement of a claimed deprivation of a constitutional right, whether or not a transfusion was actually given. It should also be noted that Doctors Brown and Sola must remain as defendants for the independent reason that they, among others, are named as representatives of a class of medical doctors. (Pretrial Order No. 2, page 35)

The motion of defendants Brown and Sola for dismissal of the action as to them, because of lack of jurisdiction, is denied.

Pursuant to the June 8, 1967 memorandum decision, plaintiffs have made no mention in pretrial order No. 2 (which order contains the admitted and disputed facts as to each instance relied upon by plaintiffs) of the instance of adult transfusion involving plaintiffs Eugene and Jean Alicki and of defendants St. Frances Xavier Cabrini Hospital and Carter Swanson, M.D., who were concerned only with the Alicki incident and, in the case of the hospital, another dismissed incident involving an adult. Similarly, plaintiffs have made no mention in pretrial order No. 2 of the instance of adult transfusion involving plaintiffs Joseph G. and Shirley L. Chabot and defendant John Caputo, M.D., who were concerned only with the Chabot instance. It follows that the action should be dismissed as to the

R. 889

defendants St. Frances Xavier Cabrini Hospital, Carter Swanson, M.D., and John Caputo, M.D., and it is so ordered.

The action may also be regarded as abandoned, and is therefore ordered dismissed as to a number of persons named in the complaint or supplemental complaint as defendants, but as to whom no grievance is stated in pretrial order No. 2. Falling in this category are F. W. Fells, Business Manager of Firlands Sanatorium; Swedish Hospital; Doctor's Hospital; Group Health Hospital; Everett Clinic, Inc.; Walla Walla General Hospital; Edwin Brockenbrough, M.D.; Jerry De Groot, M.D.; Richard Haugen, M.D.; Fred J. Jarvis, M.D.; Alfred Magar, M.D.; H. F. Newman, M.D.; Thomas W. Skalley, M.D.; Franklin Smith, M.D.; Edward Powers, M.D.; Quay Cutshall, M.D.; and George Postill.

The other motions denominated motions for dismissal on the ground of lack of jurisdiction are, in actuality, motions to dismiss for failure to state a claim upon which

relief can be granted. We deal with the questions raised by these motions as a part of our consideration of the case on its merits.

DATED November 20th 1967.

/s/ Frederick G. Hamley
Frederick G. Hamley
United States Circuit Judge

/s/ William J. Lindberg
William J. Lindberg
United States District Judge

/s/ W. T. Beeks
W. T. Beeks
United States District Judge

R. 890

FOOTNOTES

[1] In *Phillips,* the Grand River Dam Authority, a state agency, was empowered to construct the Grand River Dam and to borrow money and accept grants from the United States for such purposes. Construction of the project was begun, using money borrowed and grants accepted from the United States. During the construction, state roads were flooded and attempts by the Governor to recover from the state agency on claims resulting from the flooding of the roads were unsuccessful. The Governor later declared martial law in an area surrounding a part of the damsite and ordered the State Adjutant General to occupy it. Acting in conjunction with other state officials the Governor then obtained in a state court an exparte order restraining further work on the dam by the Grand River Dam Authority. At this point the United States commenced an action in the federal district court to enjoin the Governor and other state officials from interfering with the Grand River Dam construction project. A three-judge district court was convened and an injunction in favor of the United States was issued by the special court. On appeal, the supreme court, Mr. Justice Frankfurter speaking, held that this was not the proper case for convening a three-judge court because the jurisdictional prerequisites had not been met.

[2] See Memorandum Decision of June 8, 1967, pages 4 and 5. In *Ex parte Young,* 209 U. S. 123 (1908) the supreme court upheld the power of a federal trial judge to enjoin the Minnesota attorney general from enforcing a railroad

R. 891

rate statute found to violate due process. The effect of the decision was to bring acts of state officers within the

scope of federal judicial review and to subject the states to the restrictions of the federal constitution in situations where they might otherwise ignore it. See *Wright, Handbook of the Law of Federal Courts* (1963), page 160. The doctrine led to the nullification of state legislative attempts to cope with the increasing needs of a burgeoning industrial society when a single federal judge would issue an injunction invalidating a particular state regulatory statute. Limitations on federal jurisdiction in such circumstances were essential to preserve the proper allocation of power between the United States and the several states, which is at the heart of a federal system. Exhaustion of state remedies before challenging the state action in a federal forum was one limitation. The creation of the three-judge court procedure to handle constitutional attacks on state statutes was another. It was the belief in Congress that there would be less public resentment where the enforcement or operation of the state statute attacked on federal constitutional grounds was stayed by a court of three judges, at least one of whom was a circuit court judge, and the decision of such court was directly appealable to the supreme court.

[3] See also, *Kesler* v. *Dept. of Public Safety,* 369 U. S. 153, 157, overruled on other grounds in *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965); *Query* v. *United States,* 316 U. S. 486, 489 (1942); *Ex Parte Bransford,* 310 U. S. 354, 361 (1940); *"The Three-Judge District Court in Constitutional Litigation,"* David P. Currie, 32 Univ.

R. 892

of Chicago Law Review, 1, 43. But see *Maison* v. *Confederated Tribes,* etc., (9 Cir. 1963) 314 F. 2d 169, 170, footnote 1.

[4] With respect to the merits of the case, see the court's opinion filed herewith.

[5] Both Evonne Sayers and Martha Ridge were suffering from vaginal bleeding. Each had refused blood transfusions and had in fact signed a written document releasing the hospital and doctor from any liability for any injury to her arising from a failure to give her a blood transfusion. Each woman is the mother of five children. In the Ridge instance the court appointed a guardian on the petition of the hospital without giving any notice to her of the proceeding involving her. In fact, Mrs. Ridge first heard of the matter on a radio news broadcast the day after the order had been entered. The court appointed a guardian over Mrs. Sayers on the petition of the patient's mother despite the patient's refusal and the refusal of her husband to consent to the blood transfusions. In each case the consent was given by the guardian. In the Ridge instance no transfusion was actually given. In the Sayers instance, a blood transfusion was given.

In the Ridge case, the court noted:

> "The interest of the state in preserving the life of the mother for the benefit of the minor children of the ward outweighs the constitutional prohibition against interfering with the free exercise of her religious beliefs." (Pretrial order No. 2, page 29b).

R. 893

In the Sayers case the court noted:

> "The Constitutional right to the free practice of religion is not absolute but must be balanced against other rights, such as the right of children of tender years to have a good and loving parent. * * * The medical control of one's body is not absolute but relative when there are minor children dependent upon the survival of the adult." (Pretrial order No. 2, pages 32 and 33).

[6] In support of their motion for reconsideration of the two adult cases, plaintiffs cite *Louisville and Nashville*

Railroad v. *Garrett,* 231 U. S. 298, 58 L. Ed. 299, 34 S. Ct. 48 (1913); *Sterling* v. *Constantin,* 287 U. S. 378, 77 L. Ed. 275, 53 S. Ct. 190 (1932); and *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, 4 L. Ed. 2d 568, 80 S. Ct. 568 (1960). While these cases upon casual examination appear to support plaintiffs' contention of pendent jurisdiction of this court to consider the adult cases of Sayers and Ridge, a careful consideration of the cases (including the district court opinion in *Constantin* v. *Smith,* 57 F. 2d 227) indicates that the supreme court in using language such as:

> "The jurisdiction of the District Court so constituted (three-judge district court) * * * extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." (*Sterling* v. *Constantin, supra,* pages 393-4)

was not referring to issues or claims that did not arise directly or indirectly because of action taken by virtue of the state statute under attack. In other words, as indicated by the court in the *Florida Lime* case, pages 80 and 84, a three-judge district court has jurisdiction over all claims—state or federal—raised against the *statute,* but no jurisdiction over related matters not in some way challenging the statute.

R. 894

While the Sayers and Ridge cases involve Jehovah's Witnesses against whom court orders were entered authorizing blood transfusions over their objections on religious grounds, neither the court orders nor any other action of the defendants were related to or involved the Juvenile Court Law here under attack. Because this court so construes its authority under section 2281, it must for the reasons stated in its June 8, 1967 Memorandum Decision,

pages 3 to 6, deny the plaintiffs' motion to reconsider the court's dismissal of plaintiffs, Evonne Sayers and Martha Ridge.

Furthermore, the court having decided on the merits that plaintiffs are entitled to no relief under their principal action attacking the state statute, there would be no occasion to exercise pendent jurisdiction with respect to plaintiffs' adult cases.

[7] In this connection, see the court's Opinion filed herewith, dated November 20, 1967.

[8] The unopposed motions of defendants, Bert DeGroot, M.D., Robert Olson, M.D., and John P. Mucklestone, that the action be dismissed as to them were granted before the trial commenced. During the trial the court granted the motion to dismiss defendants, Everett General Hospital, Alfred Muller and James P. Hunter on the ground that the court had no jurisdiction over said parties.

OPINION

R. 895

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil Action No. 6595

[SAME TITLE]

R. 896

[Filed November 20, 1967]

Before: HAMLEY, Circuit Judge, and
LINDBERG and BEEKS, District Judges.

LINDBERG, District Judge:

The principal plaintiffs herein are individual Jehovah's Witnesses whose minor children, contrary to the expressed beliefs and directions of their parents, were given blood transfusions under court orders obtained pursuant to provisions of the Juvenile Court Law of the State of Washington, namely RCW 13.04.010(12) and 13.04.095.[1] Under this statutory authority, superior court judges of the State of Washington, on such showing as they deemed sufficient, declared the minor children of Jehovah's Witnesses, included herein as plaintiffs, to be dependent children for the purpose of authorizing blood transfusions of the children.

R. 897

against the expressed objections of the parents.

The proceeding was brought by plaintiffs, individually as adults,[2] as parents and minors, and as a class action on behalf of the eighty-nine hundred Jehovah's Witnesses in the State of Washington to challenge the constitutionality of the described application of the Juvenile Court Law to

plaintiffs. Also joined as parties plaintiff are The Jehovah's Witnesses, an unincorporated religious association, and the Watch Tower Bible and Tract Society of Pennsylvania, a nonprofit corporation chartered by the State of Pennsylvania and the legal governing agency of the Jehovah's Witnesses.

The defendants are the Attorney General and other officials of the State of Washington, individual physicians, superior court judges and officials of the superior court, and trustees, administrators and members of the staffs of hospitals in the State of Washington. Some of the defendant physicians were sued not only as individuals but also as representatives of a class which includes "all medical doctors in the State of Washington who are employed in and paid by public institutions operating directly with funds raised entirely or in part from the taxpayers of the State of Washington."[3] Some of the defendant hospitals were also sued not only individually but also as representatives of a class which includes all hospitals in the State of Washington operated by the state, a county, or by any public hospital district.[4]

The action is brought as a civil rights action pursuant to 42 U.S.C. § 1983, claiming that the actions of the state judges under RCW 13.04.010(12) and 13.04.095 violated plaintiffs' federally-guaranteed constitutional rights and asserting that in all probability similar violations of the Constitution will occur unless precluded by intervention of a

R. 898

federal court. Accordingly, plaintiffs seek declaratory and injunctive relief which will stop this practice for the future. Plaintiffs do not seek monetary damages for past deprivations.

Plaintiffs sought and obtained the convening of a special three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284. This request was made and granted because plaintiffs seek to enjoin the enforcement of a state statute[5]

of general application on the ground of invalidity under the federal Constitution.

The gist of the plaintiffs' complaint is that the defendant physicians, hospitals, hospital personnel, superior court judges and juvenile court employees have used the Juvenile Court Law to obtain court orders removing the children of Jehovah's Witnesses from the custody of their parents who refuse on medical and religious or personal grounds to consent to blood transfusions for their children once the children have been placed in the care of a physician. The court order makes the child a ward of the court and authorizes blood transfusions to be given to him when the attending physician determines the transfusion is necessary. This court order is obtained despite the fact that plaintiffs allegedly have given or have sought to give in each instance to the hospitals or doctors affected a written release discharging the hospitals or doctors from any and all liability for any untoward results arising from plaintiffs' refusal to accept blood transfusion for their children. Implicit in the issuance of these court orders is the finding by the court that the Jehovah's Witnesses, despite their attempt both to provide proper medical care for their children and to comply with the tenets of their faith, have been wilfully and grossly neglectful as to the medical care necessary for the

R. 899

well-being of their children.

Plaintiffs assert that the application of the Juvenile Court Law under these circumstances violates fundamental rights and liberties secured to them under the Constitution of the United States. Plaintiffs principally contend:

1. That the actions of the defendants deprive plaintiffs of their rights under the First Amendment to freedom of association, to the free exercise of their religion and to freedom from the fashioning of any laws respecting the establishment of religion, which rights are made applicable to the states by the Fourteenth Amendment.

2. That plaintiffs have been denied life, liberty and property without due process of law under the Fifth Amendment, made applicable to the states by the Fourteenth Amendment.

3. That plaintiffs have been denied their right of family privacy protected by virtue of the Ninth and Fourteenth Amendments.

4. That plaintiffs have been denied equal protection of the laws of the State of Washington in that the state has protected the religious liberty and parental rights of all other citizens and all other religious denominations except the plaintiffs.

5. That the actions of superior court judges of the State of Washington in compelling blood transfusions over the protests of plaintiffs has caused animosity toward plaintiffs and has interfered with their right of association by making it more difficult for plaintiff, Watch Tower Bible and Tract Society, and individual plaintiffs to attract and hold members for their social and religious purposes. Further, because of the acts taken pursuant to the challenged statute, a member of the Jehovah's Witnesses living in or visiting the State of Washington knows that his conscience and religion

R. 900

will not be respected and his family privacy is not as safe as that of the members of all other religious groups.

6. That plaintiffs are a respectable people who have a deep sense of responsibility and who seriously endeavor to care for their families in harmony with Christian principles as set forth in God's Word, the Holy Bible, and that they have a right to decide what medical treatment they will accept for their children.

7. That the defendant physicians and hospital officials are committing an unlawful assault forbidden by law in forcing medical treatment upon the children of Jehovah's

Witnesses contrary to express parental authority. Since Jehovah's Witnesses are exercising parental discretion in order to care for their children's welfare as best they can, there is no lawful basis under the *parens patriae* power of the state for the state's alleged unlawful and unconstitutional interference with the exercise of parental authority and discretion when a Jehovah's Witness in good faith disagrees with a doctor about medical treatment for his child involving blood transfusion.

8. That plaintiffs will be irreparably injured unless the defendants are permanently enjoined from continuing to apply the Juvenile Court Law to plaintiffs in the manner constitutionally challenged in this action.

With regard to declaratory relief as to the minors involved, plaintiffs seek a decree declaring that RCW 13.04.010(12) and RCW 13.04.095, provisions of the Juvenile Court Law of the State of Washington, are invalid under the Constitution of the United States, as applied by defendants in making children of Jehovah's Witnesses wards of the state court for the purpose of authorizing compulsory blood transfusions.

R. 901

Concerning injunctive relief, plaintiffs seek to: (1) enjoin defendant state judges, "their representatives, agents and successors" from declaring children of plaintiffs or members of plaintiffs' class to be dependent children and wards of the court, pursuant to RCW 13.04.010(12) and RCW 13.04.095, "solely on a finding that the parents have refused transfusion of blood on religious or medical grounds," and from entering orders authorizing blood transfusions of such children; (2) enjoin named defendant doctors, hospitals, hospital personnel, "their representatives, agents, employees, attorneys and successors" from bringing any civil proceeding for the purpose of enforcing or applying RCW 13.04.010(12) and RCW 13.04.095 to Jehovah's Witnesses so as to compel blood transfusions of

the children of Jehovah's Witnesses contrary to the stated religious and medical objections of the parents; (3) enjoin the same defendant doctors, hospitals, etc. from in any way seeking to impose or force blood transfusions on the children of Jehovah's Witnesses against the will of their parents with or without court orders; and (4) enjoin all physicians in the State of Washington as a class, and all hospitals in the State of Washington as a class, in keeping with the requested injunctive provisions described above.

Before the court for a decision on the merits, then, are the ten cases involving the children of Jehovah's Witnesses and enumerated in pretrial order No. 2 wherein oral or written orders were obtained from superior court judges of the State of Washington pursuant to the challenged state statute.

In each of the ten enumerated cases, Jehovah's Witnesses have based their refusal to consent to blood transfusions on their religious beliefs and medical objections

R. 902

regarding the use of blood. Plaintiffs believe and accept as authoritative and binding upon them the admonition of Almighty God Jehovah found in the Holy Bible commanding Christians to "abstain from blood."[3] Their belief places a positive religious duty on the father in particular to provide for his children and to apply their religious views, including abstinence from blood, in the family circle. In this connection, it is the responsibility of the father to see that no member of his family receives a blood transfusion, and no court or other official body can relieve him of that responsibility. If a plaintiff receives a blood transfusion, this could, in the view of the plaintiffs, mean permanent spiritual harm to both the child and parent or adult.

According to the Jehovah's Witnesses, blood transfusions involve certain risks, are of limited value, and there are alternative means of treatment which makes the use of such therapy unnecessary and inadvisable.[4] With

respect to this view, plaintiffs contend that in the cases at issue doctors have never testified as to the hazards, dangers or uncertainties of blood transfusions, and the alternative means of treatment have not been placed before any of the superior court judges.

Nevertheless, it is the prevailing medical view that blood transfusions are not only safe but necessary in those kinds of situations presented to the court in the specific instances involving the minor plaintiffs in this case.[10]

As previously noted, plaintiffs argue that RCW 13.04.-010(12) and RCW 13.04.095 are invalid under the Constitution of the United States as applied by defendants in compelling the minor children of Jehovah's Witnesses to submit to blood transfusions over the religious objections of the parents. According to plaintiffs, the reason these

R. 903

statutes are invalid as so applied is because they facilitate state impairment of plaintiffs' religious freedom, contrary to the First and Fourteenth Amendments, and plaintiffs' parental rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Substantially the same argument was advanced by Jehovah's Witnesses in *Prince* v. *Massachusetts*, 321 U. S. 158, involving an appeal from convictions for violating Massachusetts' child labor laws. Contrary to those state laws, the aunt and custodian of a nine-year-old girl permitted and encouraged the girl to sell Bible tracts on the public streets. The aunt contended that the child was exercising her right, under the First and Fourteenth Amendments, to preach the gospel. She buttressed this argument with a claim of parental right as secured by the Due Process Clause of the Fourteenth Amendment.

The Supreme Court affirmed the judgment, holding that the family is not beyond regulation in the pubic interest, as against a claim of religious liberty. Among other things, the Court said:

"* * * neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People* v. *Pierson,* 176 N. Y. 201, 68 N. E. 243. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." (Footnotes omitted) 321 U. S. at 166-167.

R. 904

"* * * Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." 321 U. S. at 170.

It appears to us that the holding of *Prince* is applicable here and that our special three-judge court is bound by that decision. Thus, whatever merit there be in plaintiffs' argument that a more thorough consideration of philosophic principles calls for a contrary conclusion, we are not in a position to decide contrary to *Prince.* It need only be added that our case, as was also true in *Prince,* does not

involve any of the rights of parents to train and indoctrinate their children in religious matters.

It is true that in *Prince,* the court made it clear that it did not intend that opinion to lay the foundation for every state intervention in the indoctrination and participation of children in religion which may be done in the name of their health and welfare. (321 U. S. at 171). But we think it does lay the foundation, binding upon us, for the particular state intervention in the name of health and welfare which is here under review. As stated in *Prince* (321 U. S. at 166), "The right to practice religion freely does not include liberty to expose * * * the child * * * to ill health or death."

In this special three-judge court case we are not bound by any judicial decisions other than those of the United States Supreme Court. But it is appropriate to note that in *People ex rel Wallace* v. *Labrenz,* 411 Ill. 618, 104 N. E. 2d 769, 774, 30 A. L. R. 2d 1132, testing the validity of a court order declaring the minor child of Jehovah's Witnesses a dependent child for the purpose of compelling a blood transfusion, the Supreme Court of Illinois construed the *Prince*

R. 905

case as we do here. Thus, on the basis of the *Prince* decision, the Illinois court held that the Juvenile Court Law of that state is not unconstitutional as so applied. In an exhaustive opinion the Supreme Court of New Jersey similarly interpreted *Prince* in a blood transfusion case involving the minor child of Jehovah's Witnesses. See *State* v. *Perricone,* 37 N. J. 463, 181 A. 2d 751, 756-757. See also, *Hoener* v. *Bertinato,* 67 N. J. Super. 517, 171 A. 2d 140, 143.

We therefore hold, on the compelling authority of *Prince* that RCW 13.04.010(12) and RCW 13.04.095 are not invalid under the Constitution of the United States, as applied in this case.

Assuming, nevertheless, as plaintiffs contend, that the *Prince* case is not dispositive of the main action because

(1) the supreme court specifically limited the *Prince* holding to the facts of the case, and (2) the supreme court to date has not passed on the merits of the constitutional questions involved in the blood transfusion cases, this court would have before it an open question on the merits of the case. If this be the case sound judicial administration would warrant the application of the equitable abstention doctrine[11] with respect to the federal questions raised by plaintiffs' constitutional attack on the state statute.

Equitable abstention is designed to restrict the exercise of federal jurisdiction, at least in the first instance, by having the federal courts defer to the state courts in the consideration and interpretation of state statutes. Because the award of equitable relief is traditionally regarded as a discretionary matter, the court should properly consider whether the circumstances warrant the initial construction of the statute in question by the highest court of the state and, if so, abstain from the exercise of federal jurisdiction.

R. 906

Where the constitutionality of a state statute, as in the instant case, is involved, there are sound reasons why any uncertainty as to its meaning should first be resolved by the state. The policy of comity between state and federal governments suggests one reason why the interpretation of a state statute should first be rendered by state authorities. Also, state courts ideally should be better informed about state policies and purposes so that construction of the statute may be achieved more accurately and meaningfully. In this connection, the supreme court in *Prince,* unlike this court, had the benefit of the construction placed on the statute therein involved by the Massachusetts high court. The supreme court noted that the decision of the Massachusetts court on what constituted a "sale" or "offer of sale" differed from the trend in other states, but that the supreme court was bound by the state determination, 321 U. S. 158, 163 and annotations 5 and 6.

More importantly, the resolution of uncertain statutory authority by the state courts may obviate federal adjudication of constitutional questions arising from the enactment.[12]

The abstention doctrine, however, is not automatically applied. As already noted, whether the court should exercise its equity powers is a discretionary matter, and the decision to defer action initially depends upon a finding that the special circumstances prerequisite to equitable abstention exist. Since the practical effect of the court's decision to abstain in a case over which it has been given jurisdiction by law is to deny the plaintiff his right to a federal forum, the decision to abstain not only requires a reasonably uncertain issue of state statutory interpretation, but also the availability of adequate state procedures for resolving the uncertainty.

R. 907.

A first prerequisite, then, is that the challenged application of the state enactment be fairly open to interpretation. Where it appears that the statute necessarily had to be interpreted in the manner under attack, no useful purpose would be served by federal abstention to permit the state court to pass upon such application.[13] The abstention doctrine becomes applicable in those situations where it is uncertain that the state enactment authorized the restrictions imposed on the persons bringing the action or on their activities.[14] This condition would appear to be satisfied in the instant case.

The statutory application herein challenged permits a child to be made a ward of the court upon a finding that the child is "grossly and wilfully neglected as to medical care necessary for his well-being." However, it seems pertinent to ask whether "gross and wilful neglect" is a permissible finding under the statute when a parent, upon religious grounds or because of his views as to medical treatment, refuses to consent to blood transfusions for his minor child where the attending physician has determined blood transfusions are medically necessary. As applied here when a

Jehovah's Witness desires to provide medical care for his child, but cannot consent to a particular form of medical treatment, such as blood transfusions, determined to be necessary by the attending physician, does the Juvenile Court Law require that child to be characterized as one "grossly and wilfully neglected as to medical care necessary for his well-being?" The statute appears to have two parts: one portion requiring medical care necessary for the well-being of the child, and the other, under a plausible interpretation, providing that the neglect in failing to provide or agree to the medical treatment recommended as necessary be gross and

R. 908

wilful. Although a blood transfusion might be necessary for the well-being of the child, refusal to consent to a blood transfusion, coupled with willingness to consent to substitutes, if any, may not constitute "gross and wilful" neglect. Use of the language "grossly and wilfully" in the statute would thus appear to make the application of the statute to plaintiffs in the blood transfusion cases uncertain.

The second prerequisite to the application of the abstention doctrine is that adequate state procedures exist to resolve the uncertainty of the law. This prerequisite would appear to be satisfied by the Washington Uniform Declaratory Judgments Act, RCW 7.24.020. That statute provides in pertinent part:

> "A person * * * whose rights, status or other legal relations are affected by a statute * * * may have determined any question of construction or validity arising under the * * * statute * * * and obtain a declaration of rights, status or other legal relations thereunder."

Although the cases involving the challenged application of the Juvenile Court Law are moot by the time of appeal, jurisdiction may still be exercised under the state declara-

tory judgments act. When a matter of public interest is involved the Washington supreme court has retained jurisdiction to decide the broad issues even though the particular case raising them is moot.[15] The instant case would seem to be a proper one for an application of the Washington Declaratory Judgments Act similar to the one made in the *National Electrical Contractors* case.[16] In the instant case basic rights are thrown into conflict: the *parens patriae* power of the state versus the constitutional and civil rights of Jehovah's Witnesses. In this connection, the public importance in the correct construction of the

R. 909

Juvenile Court Law cannot be doubted, and the superior courts of the state should have the benefit of the construction of this statute by the state supreme court for future guidance in similar situations.

The action before us is, in reality, a declaratory judgment action wherein the application of a state statute is being challenged on constitutional grounds; the challenged application presents a question of statutory interpretation not heretofore passed upon by the Supreme Court of the State of Washington. State procedures exist for resolving the issues of construction raised by the application. The essential prerequisites for invoking the doctrine of equitable abstention we believe are present. The policy behind the development of the doctrine—in general to preserve the framework of federalism, and in particular to give the state an opportunity to mold its policy to conform to or accord with constitutional standards—favor utilizing the doctrine in this case. Indeed, resolution of the matter by the state might avoid the constitutional issues presented by the application of the statute.

In sum, if we, as a specially-constituted three-judge court, were to conclude the *Prince* decision not controlling we would then consider the case before us as tailored to the exercise of federal abstention.

For the reasons set forth herein, the plaintiffs are not entitled to the relief sought and the action will be dismissed as to all defendants.

DATED November 20th 1967.

/s/ Frederick G. Hamley
United States Circuit Judge

/s/ William J. Lindberg
United States District Judge

/s/ W. T. Beeks
United States District Judge

FOOTNOTES TO OPINION

[1] RCW 13.04.010(12) of the Juvenile Court Law of the State of Washington provides:

> *"Juvenile court law—Dependent and delinquent children defined—Wards of state.* This chapter shall be known as the 'Juvenile Court Law' and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for or contribute to, the delinquency or dependency of such children.
>
> "For the purpose of this chapter the words 'dependent child' shall mean any child under the age of eighteen years:
>
> • • •
>
> "(12) Who is grossly and wilfully neglected as to medical care necessary for his well-being."

RCW 13.04.095 provides:

> *"Commitment of child—Order of court—Powers of department of institutions—Order rescinded when reformation complete.* When any child shall be found to be delinquent or dependent, within the meaning of this chapter, the court shall make such order for the care, custody, or commitment of the child as the child's welfare in the interest of the state require. Subject to further order, the court may commit the child:
>
> "(1) To the care of such child's parents, subject to supervision of the probation officer; or
>
> "(2) To the custody of a probation officer, subject to such conditions as the judge may impose; or
>
> "(3) To a reputable citizen or association able and willing to receive and care for such child; or
>
> "(4) To an appropriate private agency authorized to care for such children; or

"(5) To the department of public assistance; or

"(6) To the department of institutions.

"In no case shall a child be committed beyond the age of twenty-one years. A child committed to the department of institutions shall be subject to

R. 911

the supervision and control thereof and the department shall have the power to parole such child under such conditions as may be prescribed.

"The department of institutions shall have the power to discharge such child from custody, and the court shall have the power to rescind the commitment of such child, whenever his or her reformation shall be deemed complete."

[2] In certain instances, the superior court judges also entered orders authorizing blood transfusions of adult Jehovah's Witnesses over the strenuous objections of the adults. This court dismissed those aspects of the case involving the adult Jehovah's Witnesses. See June 8, 1967 Memorandum Decision, pages 3-6 and Addendum, pages 4-5.

[3] In pretrial order No. 2 the description of this class of physicians also included the clause "or operating under funds granted to said hospitals by the United States Government." In their proposed findings of fact plaintiffs deleted this clause.

A second class of physicians was also designated in the complaint, namely, "all medical doctors in the State of Washington." (Complaint, page 14) However, in pretrial order No. 2, which superseded the pleadings, this class of physicians was eliminated. (Pretrial order No. 2, page 35) In their "Additional Proposed Findings of Fact," plaintiffs seek to reinstate this class of defendant physicians. (Additional Findings of fact, page 1) Pretrial order No. 2 (page 45a), provides that that pretrial order shall not be amended "except by order of the Court pursuant to agreement of

the parties or to prevent manifest injustice." Plaintiffs have not sought nor obtained court authority to amend pretrial order No. 2 by reinstating this class of physicians, and therefore the same may not be regarded as a class of defen-

R. 912

dants subject to the jurisdiction of this court in this cause.

[4] In the complaint the class of defendant hospitals was described more broadly as "all licensed hospitals in the State of Washington." (Complaint, page 14) However, the class of defendant hospitals was narrowed in pretrial order No. 2, as noted above. (Pretrial order No. 2, page 35) In their "Additional Proposed Findings of Fact," plaintiffs seek to add a second class of defendant hospitals, conforming to the broad class of defendant hospitals described in the complaint. (Additional Findings of Fact, page 2) However, for the reasons stated in note 3 above, this second class of hospitals may not be regarded as a class of defendants subject to the jurisdiction of this court in this cause.

[5] See footnote 1.

[6] Plaintiffs also sought a declaratory judgment and injunctive relief with respect to blood transfusions administered to adults. This aspect of the case was dismissed. See footnote 2, *supra*.

[7] Oral orders issued in the cases involving the Maydole child and the Hardy child; written orders were entered in the eight remaining cases involving the Elam child, the Lawrence child, the Smith child, the Seelye child, the Burnitt child, the Pen child, the Brockman child, and the Nichol child. Blood transfusions were actually administered to five of the ten children made wards of the Juvenile Court for such purpose, that is, to Bradley Scott Seelye, Thomas Allen Burnitt, Michael Pen, Sharilyn Brockman, Geri Lynn Nichol. Although the other five children had been removed

from the custody of their parents and declared wards of the Juvenile Court to permit them to receive compulsory blood transfusions, blood transfusions were not in fact given to Russell Scott Maydole, Jeffrey Ward Elam, Heidi Jo Lawrence, Jeanetter Smith and Loren Hardy. Five of the cases involved birth defects; erythroblastosis fetalis was diagnosed for the Maydole, Seelye and Brockman children; congenital defects requiring surgery correction were diagnosed for the Lawrence and Nichol children. The five remaining cases involved a peptic ulcer with gastric intestinal hemorrhaging (Burnitt); osteomyelitis and generalized staphylococcal infection (Pen); damaged pancreas with possible internal bleeding (Elam); severe burns (Hardy); injuries (Smith). In none of the cases is it recorded that the judges heard contrary medical testimony relating to the risks involved in blood transfusions. Little, if any, notice was given to the parents of the children regarding the hearing to determine if the children were "grossly and wilfully neglected as to the medical care necessary to their well-being." No notice was given in the Seelye case; it is not apparent from the record whether the parents of the Pen and Brockman children were given any notice or were present at the hearing; the Smiths were given one hour notice of the hearing. Blood transfusions were actually administered to the Nichol child before the hearing was completed and the court order making her a ward of the court was signed.

[8] The foundation for the belief of the Jehovah's Witnesses respecting blood transfusions is found in the following quotation from Acts of the Apostles, chapter 15, vs. 20:

> "Hence my decision is not to trouble those from the nations who are turning to God, but to write to them to abstain from things polluted by idols and from fornication and from what is strangled and from blood."

and the quotation from Leviticus, 17th chapter, vs. 10:

> "As for any man of the house of Israel or some alien resident who is residing as an alien in your midst, who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people."

Plaintiffs rely on evidence they contend establishes that their views are scientifically supportable, since in the area of blood transfusion knowledge is rapidly expanding, opinions are changing, hazards exist, alternative means of treatment are possible and doctors disagree. The plaintiffs offered evidence tending to show that, as to many types of situations where blood transfusions are often given, there exists medical opinion that transfusions are of little value and, in addition, may substantially harm the patient. They have also offered evidence tending to show that there is opinion that blood transfusions are never indicated, since there are always treatments available which are better than transfusions.

Dr. Exner testified specifically that transfusions are contraindicated as treatment for continued gastrointestinal bleeding (Transcript, page 208), and erythroblastosis fetalis (Transcript, page 210), and that better treatments always exist for excessive hemorrhaging during major surgery (Transcript, page 212). He also testified that transfusions are never mandatory (Transcript, page 254).

Dr. Riggle, an osteopathic surgeon and Jehovah's Witness from Texas, testified that he had found no cases in which blood transfusions were mandatory (Transcript, page 267) and, in particular, that in his experience alternate therapy was satisfactory for erythroblastosis fetalis.

Dr. Lodi [sic, properly *Dixon*], a surgeon and Jehovah's Witness since 1950, testified that he has not used trans-

R. 915

fusions since 1950, and no one has died from non-transfusions (Transcript, page 149). However, he had not treated any cases of severe blood loss due to trauma, except one in which the victim was transfused under a court order over his objection.

Dr. Wilson, senior pathologist, King County Coroner's Office, knew of no cases in his experience in which death or disability resulted from failure to give a blood transfusion. (Transcript, page 83). However, he also testified that there are instances where transfusions are lifesaving (Transcript, page 113) and that transfusions were accepted medical practice in King County (Transcript, page 139).

[10] The defendants have admitted that there is often substantial difference of opinion regarding the value of blood transfusions in specific instances. However, they offered proof tending to show that, for some conditions, informed medical opinion agrees that death or disability is very probable if no transfusion is given, and that the probability of recovery in such cases can be appreciably increased only if a transfusion is given. Dr. Guntheroth specifically mentioned that in profound anemia accompanied by generalized severe infection transfusion is essential to save life, and blood substitutes are of no value (Transcript, page 359). He was also of the opinion that blood transfusions are necessary to save life after severe loss of blood due to accident, and also when a baby is suffering from acute erythroblastosis fetalis (Transcript, pages 391-92), and that most, if not all, medical authorities agree to this (Transcript, page 392).

Dr. Eloise Rosalee Giblett, who testified by deposition, noted that the medical opinion held by the great majority of practitioners in this medical community, in this country, and in the world is that there are people who would die if they were not otherwise transfused. (Deposition, page 6).

R. 916

It was the considered opinion of the attending physi-

cians in each of the cases retained in the action that a blood transfusion was or would be vital to save the life of the patient.

[11] When state action is challenged in a federal court on federal constitutional grounds and there are questions of state law which may dispose of the case or materially change the nature of the constitutional problems, the federal court may decline to proceed though it has jurisdiction under the Constitution and the statutes. This abstention policy is usually referred to as the *Pullman* doctrine from the case of *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). The company in that case sought to enjoin the enforcement of an order of the Texas Railroad Commission on the grounds that the order denied the company rights under the Fourteenth Amendment and that the Commission lacked authority under Texas law to make the order in question. A unanimous supreme court ordered the trial court to abstain from deciding the case so that the state court could decide the state issues. In this way the federal court avoided deciding federal constitutional questions prematurely or unnecessarily; for if the state court held the order unauthorized as a matter of state law, there would be no need for the federal court to pass on the federal questions. Abstention is proper in order to avoid "unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harmon* v. *Forssenius*, 380 U. S. 528, 534 (1965).

[12] See *Harrison* v. *NAACP*, 360 U. S. 167 (1959), where there was a finding that the state law was uncertain and abstention

R. 917

was ordered. In *NAACP* v. *Bennett*, 360 U. S. 471 (1959) the supreme court reversed the district court for failing to consider whether the state law was uncertain. Again, the

major consideration behind the doctrine of abstention is that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See *e.g., Government & Civic Employees* v. *Windsor,* 353 U. S. 364 (1957); *Albertson* v. *Millard,* 345 U. S. 242 (1953); *Shipman* v. *DuPre,* 339 U. S. 321 (1950); *American Federation of Labor* v. *Watson,* 327 U. S. 582 (1946); *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101 (1944); *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168 (1942); *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941).

[13] See, *eg., Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713 (1962).

[14] See *Baggett* v. *Bullitt,* supra note 9 at pages 376-77, and note 13. Moreover, even where the state court has considered the precise issue constitutionally attacked in the federal court, abstention has been exercised on the ground that the federal constitutional objections had not been presented to the state court and might have caused that court to interpret the statute differently had those objections been presented. *City of Chicago* v. *Atchison, T & S. F. R. R.,* 357 U. S. 77 (1958).

R. 918

[15] See *National Electrical Contractors Assoc.* v. *Seattle School District No. 1,* 66 Wn. 2d 14 (1965). In its opinion, the Washington Supreme Court quoted and specifically relied upon the following language from the opinion of the Illinois Supreme Court in a blood transfusion case, *People ex rel Wallace* v. *Labrenz,* 411 Ill. 618, 104 N. E. 2d 769, 772 (1952) as support for the proposition that the court should decide a moot issue where sufficient public interest in the question warrants:

> "Before we reach the merits, we meet the State's contention that the case is now moot and should be

dismissed because the blood transfusion has been administered; the guardian discharged, and the proceeding dismissed. Because the function of courts is to decide controverted issues in adversary proceedings, moot cases which do not present live issues are not ordinarily entertained. 'The general rule is that when a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved or where the substantial questions involved in the trial court no longer exist, it will dismiss the appeal or writ of error.' *People* v. *Redlich,* 402 Ill. 270, 279.

"But when the issue presented is of substantial public interest, a well-recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal. (See cases collected in 132 A.L.R. 1185.) Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." (At 66 Wn. 2d 14, 19-20).

[16] Ibid.

R. 919

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil Action No 6595

[SAME TITLE]

R. 921

[Filed November 20, 1967]

The above-entitled cause came on regularly for trial and the court having duly considered the evidence, including the admitted facts set forth in pretrial order No. 2, and having rendered a written decision and opinion herein, and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

Plaintiffs are Jehovah's Witnesses, and bring this action on behalf of all Jehovah's Witnesses in the State of Washington. The class which plaintiffs represent is so numerous as to make it impracticable to bring them all before the Court.

II.

Plaintiffs fairly insure the adequate representation of all members of the class similarly situated.

III.

Plaintiffs are Jehovah's Witnesses, a minority religious group. They have a deep sense of responsibility toward their families and seriously endeavor to care for their families in harmony with their Christian principles set forth in the Holy Bible.

IV.

Plaintiffs individually as adults and as parents and as a class refuse to accept blood transfusions for themselves or for their minor children, for the following reasons:

(a) They believe and accept as authoritative and binding upon them the following passages in the Holy Bible:

> "Hence my decision is not to trouble those from the nations who are turning to God, but to write to them to abstain from things polluted by idols and from fornication and from what is strangled and from blood." (Acts of the Apostles, chapter 15, vs. 20.)

R. 922

> "As for any man of the house of Israel or some alien resident who is residing as an alien in your midst, who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people." (17th chapter, Leviticus vs. 10.)

(b) Plaintiffs believe that the command to "abstain from blood" is a direct command from Jehovah God prohibiting acceptance of blood in any manner including transfusions of whole blood, blood plasma or any blood derivative.

(c) They believe that blood transfusions are risky, of limited value, and that such therapy is unnecessary and inadvisable; and that there are alternative means of treatment. In refusing blood transfusions for their children or themselves plaintiffs rely on religious and medical objections.

(d) Plaintiffs are serious and conscientious in the care of their families. Their belief places a positive religious duty on the father in particular to provide for his children and to apply their religious views including abstinence from blood in the family circle.

(e) Plaintiffs believe it is the responsibility of the father to see that no member of his family receives a blood transfusion and no court or other official body can relieve him of that responsibility. If a plaintiff receives a blood transfusion, this could in the view of the plaintiffs mean permanent spiritual harm to both the child and parent or adult.

(f) In cases where blood transfusions have been administered under court orders plaintiffs have suffered mental anguish and concern over the physical, mental and spiritual well-being of the transfused child or adult.

R. 923

V.

Plaintiff Watch Tower Bible and Tract Society of Pennsylvania is a nonprofit corporation chartered by the State of Pennsylvania as the legal governing agency of the unincorporated association of Christian people known as Jehovah's Witnesses. This nonprofit corporation cares for and extends the interest of the association of Jehovah's Witnesses and seeks to extend the preaching of its doctrine and to enlarge its association and membership by public ministry in accordance with Scripture.

VI.

R.C.W. 13.04.010(12) provides:

"Juvenile court law—Dependent and delinquent children defined—Wards of state. This chapter shall be known as the "Juvenile Court Law" and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for or contribute to, the delinquency or dependency of such children.

"For the purpose of this chapter the words "dependent child" shall mean any child under the age of eighteen years:

• • •

"(12) Who is grossly and wilfully neglected as to medical care necessary for his well-being."

VII.

R.C.W. 13.04.095 provides:

"Commitment of child—Order of court—Powers of department of institutions—Order rescinded when reformation complete. When any child shall be found to be delinquent or dependent, within the meaning of this chapter, the court shall make such order for the care, custody, or commitment of the child as the child's welfare in the interest of the state require. Subject to further order, the court may commit the child:

"(1) To the care of such child's parents, subject to supervision of the probation officer; or

"(2) To the custody of a probation officer, subject to such conditions as the judge may impose; or

"(3) To a reputable citizen or association able and willing to receive and care for such child; or

R. 924

"(4) To an appropriate private agency authorized to care for children; or

"(5) To the department of public assistance; or

"(6) To the department of institutions.

"In no case shall a child be committed beyond the age of twenty-one years. A child committed to the department of institutions shall be subject to the supervision and control thereof and the department shall have the power to parole such child under such conditions as may be prescribed.

"The department of institutions shall have the power to discharge such child from custody, and the court shall have the power to rescind the commitment of such child, whenever his or her reformation shall be deemed complete."

VIII.

The defendant Superior Court Judges are state officers of the State of Washington.

IX.

Plaintiffs believe that the practice of transfusing human blood is a dangerous therapy and of dubious value.

X.

Plaintiffs believe that the importance of blood transfusion in the practice of medicine has been exaggerated, that it is overused, that indications for when blood is needed, if ever, are uncertain and that the misuse of blood transfusion causes many deaths and much illness.

XI.

Plaintiffs are willing to accept alternative treatment instead of blood or blood derivatives and believe that such alternative treatment is equally valuable or more valuable than blood transfusion.

XII.

The court finds that although medical views may differ as to the value of blood transfusions in given situations, overwhelming weight of nonsectarian medical opinion is that blood transfusions are necessary in certain

R. 925

cases to save lives, and, in fact, do save lives.

XIII.

The court finds that alternative methods of medical treatment without the use of blood or blood derivatives have been utilized in certain cases and have achieved in certain instances the same result sought to be accomplished by blood transfusions; however, this court finds that, according to the overwhelming weight of nonsectarian medical opinion, in certain situations there are no substitutes for blood or blood derivatives.

XIV.

The court finds that while some members of the medical profession believe that the life-saving value to the patient from the use of blood transfusions is overemphasized and that this method of treatment is overused, according to

the overwhelming weight of nonsectarian medical opinion the life-saving value of blood transfusions far outweighs the risks involved.

XV.

The following individual instances of the utilization of Superior Court Orders to take custody of the children of plaintiffs, or to threaten the taking of custody of the children of plaintiffs have occurred:

A. Plaintiffs Maydole.

(i) Plaintiffs Norman C. Maydole and Carolyn Maydole are residents of Snohomish County, Washington. At the time of the events hereinafter described they were residents of Wenatchee, Chelan County, Washington. They are parents of plaintiff Russell Scott Maydole, born at 8:30 p.m., November 17, 1964, suffering at the time of his birth from a blood condition known as erythroblastosis fetalis.

(ii) Defendant physician and pediatrician, Donald B.

R. 926

Fager, M.D., shortly after the birth of Russell Scott Maydole, concluded that a blood transfusion was needed. He discussed his recommendation with plaintiff Norman C. Maydole who refused to consent to a blood transfusion for his son.

(iii) Defendant Fager then telephoned Judge Lawrence Leahy and told him that he might want to give a blood transfusion to Russell Scott Maydole to correct his condition and that the parents refused to consent.

(iv) Judge Leahy stated that if Dr. Fager thought the refusal to accept a blood transfusion was life-threatening to the child that he would come over to the hospital to facilitate its use.

(v) The blood transfusion was delayed for one hour and during that period Russell Scott Maydole showed improvement. No transfusion was given to Russell Scott Maydole.

(vi) Chelan County Superior Court Judge Lawrence Leahy has adopted the following policy in cases involving Jehovah's Witnesses wherein he presided:

> "It is Judge Leahy's policy to hear the testimony of the attending physician and to ascertain whether or not, in the expert medical opinion of that physician, the patient's life and physical well-being requires a whole blood transfusion. If the attending physician testifies this is to be the case, Judge Leahy advises the physician to proceed with the transfusion, and to present a request for a written court order."

B. Plaintiffs Seelye.

(i) Plaintiff Geraldine Seelye is the parent of a son, plaintiff Bradley Scott Seelye, born November 5, 1962, in King County Hospital (Harborview Hospital) suffering from erythroblastosis feltalis.

(ii) Bradley Scott Seelye is the son of Geraldine Seelye and Laurin Seelye. Since the commencement of this action Laurin Seelye has died.

(iii) For religious reasons Laurin and Geraldine Seelye

R. 927

declined to agree to a blood transfusion for their expected child. The medical records of King County Hospital recite that an earlier child of the Seelyes had died following an exchange transfusion.

(iv) Knowing of the objections of the parents and without notice to them of the hearing, defendant Robert R. Miller, M.D., Chief Pediatric Resident, on November 5, 1962 filed a petition and proceeded to hearing before the King County Superior Court seeking to make the child a dependent child. The petition read as follows:

R. 928

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING
JUVENILE COURT

IN RE THE WELFARE OF
INFANT BOY SEELYE.

PETITION 39728

FILED
IN COUNTY CLERK'S OFFICE
KING COUNTY, WASHINGTON
NOV 5 1962
NORMAN R. RIDDELL Clerk
DOROTHY M. SWAIN Deputy

TO THE HONORABLE JUDGE OF
THE SUPERIOR COURT:

Your Petitioner, Dr. Robert Miller, represents to the Court as follows:

That INFANT SEELYE was born on November 5, 1962, at Harbor View Hospital;

That the parents of said child are Residents of King County, Washington, that the father is Laurin Seelye who resides at Enumclaw, Washington; that the mother of said child is Geraldine Seelye; who resides at Enumclaw, Washington;

That the said child is in the legal custody of said parents by (blank); that the said child resides with said parents at Harbor View Hospital, Seattle, Washington;

That the said child is dependent in this:

It is affected by a blood disease known as Rh incompatibility. A blood transfusion is urgently necessary in order to preserve the health and life of the child.

The parents refuse to consent to such transfusion.

That the said child is in need of the care, consideration and planning by the Court.

WHEREFORE, YOUR PETITIONER Prays that the Court inquire into the condition of the said child and to enter such an order in the premises as shall be for said child's welfare.

/s/ Robert R. Miller, M.D. PETITIONER

STATE OF WASHINGTON, } SS
County of King, }

Dr. Robert Miller, being first duly sworn, upon oath deposes and says: that he is the Petitioner named in the foregoing Petition; that he has read the same, knows the contents thereof, and believes the same to be true.

/s/ Robert R. Miller, M.D.

Subscribed and sworn to before me this 5 day of November, 1962.

/s/ William G. Long
SUPERIOR COURT JUDGE

R. 929

(v) An order was made by defendant Judge Long making the child a ward of the court and authorizing all care and treatment including blood transfusions which was deemed necessary in the opinion of the hospital and the attending physicians to preserve the health and life of the child. The order reads as follows:

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING.
JUVENILE COURT

IN RE THE WELFARE OF } No. 39728
INFANT BOY SEELYE } ORDER

FILED
IN COUNTY CLERK'S OFFICE
KING COUNTY, WASHINGTON
Nov 5 1962
NORMAN R. RIDDELL Clerk
DOROTHY M. SWAIN Deputy

THIS MATTER, of the welfare of INFANT SEELYE, a child born November 5, 1962; after due and regular hearing, the Court finds that all allegations of petition are true, that the welfare of said child demands that it be made a ward of the Court, subject to Court supervision; Accordingly, it is hereby Ordered:

That said child is hereby made a ward of the Court under Court supervision; and,

That consent for all necessary medical care or treatment, including a blood transfusion, is hereby given to the King County Hospital system (Harborview) and to attending physicians; and

IT IS FURTHER ORDERED that said Hospital and attending physicians, are hereby authorized and directed to render all care and treatment (including blood transfusions) which in their opinion is necessary for preserving the health and life of said child.

DONE IN OPEN COURT this 5th day of NOVEMBER, 1962.

/s/ Wm. G. Long
JUDGE

R. 930

(vi) A blood transfusion was administered to plaintiff Bradley Scott Seelye.

C. Plaintiffs Burnitt.

(i) Plaintiffs Clifford Burnitt and Joyce Burnitt, his wife, are residents of Redding, California. They are the parents of plaintiff Thomas Allen Burnitt, born on or about November 12, 1955.

(ii) On or about October 30, 1963, plaintiff Thomas Allen Burnitt was admitted to the defendant University of Washington Hospital from Juneau, Alaska, suffering from gastric intestinal hemorrhaging. This was diagnosed by defendant Loren Winterscheid as resulting from a peptic ulcer. Defendant Winterscheid recommended a blood

transfusion due to the blood loss resulting from hemorrhaging.

(iii) Upon the parents' refusal to consent to such transfusion, defendant Loren Winterscheid, a member of the hospital staff of the University of Washington and assistant professor in the Department of Surgery, petitioned for and obtained from Judge William G. Long an order authorizing the medical staff of the University of Washington to "render any and all treatment, including blood transfusions, that in their opinion may be necessary for the child's welfare."

(iv) The petition of defendant Winterscheid written out by Judge Long and signed by defendant Winterscheid was as follows:

R. 931

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY
JUVENILE COURT

IN RE WELFARE OF
THOMAS ALLEN BURNITT
a minor. } Petition 42908

FILED
IN COUNTY CLERK'S OFFICE
KING COUNTY, WASHINGTON
OCT 31 1963
NORMAN R. RIDDELL Clerk
DOROTHY M. SWAIN Deputy

I.

Thomas Allen Burnitt was born Nov. 12, 1955 and resides in King Co. Washington. Mrs. C. T. Burnitt and Clifford T. Burnitt are parents.

II.

Child is suffering from a bleeding peptic ulcer or other

gastro-intestinal hemorrhage which places his life in jeopardy. A blood transfusion is absolutely necessary in order to prevent death.

III.

Parents refuse to consent to such transfusion on religious grounds.

Accordingly, child is in need of the protection of the Court.

/s/ Loren C. Winterscheid, M.D.
Petitioner

State of Wash. }
County of King } SS

Loren C. Winterscheid, being first duly sworn, on oath deposes that he has read the foregoing petition and it is true to best of his knowledge.

/s/ Loren C. Winterscheid, M.D.

Subscribed and sworn to before me.

/s/ Wm. G. Long, Judge

R. 932

(v) A hearing was held on said petition before defendant Judge Long in the Health-Sciences Building at the University of Washington on October 30, 1963. At said hearing defendant Winterscheid testified that there was a reasonable possibility that Thomas Burnitt would die without a blood transfusion. He did not testify and he did not then and does not now believe that a blood transfusion was absolutely necessary in order to prevent death. No other qualified medical witness testified.

(vi) At the conclusion of the hearing Judge William G. Long entered the following order:

"IN RE THE WELFARE OF THOMAS ALLEN BURNITT, a minor } No. 42908 ORDER

"THIS MATTER, having come on regularly for hearing and the court having received the testimony of Dr. Loren C. Winterscheid and also that of the mother, Mrs. C. T. Burnitt, and the Court finding that said child's life is in jeopardy and that an immediate blood transfusion is absolutely necessary to prevent the death of said child, who is suffering from a bleeding peptic ulcer or other gastro-intestinal hemorrhage, and that the parents refuse to consent to such transfusion:

"IT IS HEREBY ORDERED that said child is declared to be a dependent child; that he be and remain a ward of this Court under supervision and that the Medical Staff of the University of Washington Hospital are hereby authorized and directed to render any and all treatment, including blood transfusions that in their opinion may be necessary for the child's welfare.

"FURTHER, said child shall remain in said hospital until ready for release under medical approval.

"DATED, October 30, 1963.

/s/ Wm. G. Long
Judge of Superior Court"

(vii) After the above-described court order was entered 2500 cubic centimeters of blood were administered to Thomas Allen Burnitt.

(viii) After a short period of hospitalization Thomas Allen Burnitt was discharged from the hospital and returned with his parents to Juneau, Alaska.

D. Plaintiffs Elam.

(i) Plaintiffs Adrian W. Elam and Patricia Elam are residents of Snohomish County, Washington, and are the parents of Jeffrey Ward Elam, born August 29, 1956.

(ii) On or about July 3, 1964, Jeffrey Ward Elam was injured in an accident that damaged his pancreas. On July 4, 1964, he was admitted to defendant Stevens Memorial Hospital, Edmonds, Washington, suspected to be suffering from internal bleeding.

(iii) Defendant physicians Donald E. Brown and Olav Sola, diagnosed the boy's condition as involving intra-abdominal bleeding and instituted treatment with I.V. fluids and gastric suction but would not begin surgical procedures, because permission to use blood, if in their opinion it became necessary to do so, was denied by the father of the boy.

(iv) Based on the refusal of Jeffrey Elam's parents to authorize surgery if blood was to be given, observation of the boy in his condition, plus treatment by I.V. fluids and gastric suction, was administered until about 5:00 p.m. on July 4, 1964.

(v) At about 5:00 p.m., defendants would not operate unless they had permission to administer blood, if they thought it was required. They advised Jeffrey Elam's parents that they would be happy to transfer the child to another hospital and another doctor, if they desired, but said parents did not authorize this.

(vi) The operative procedure was delayed four or five hours until defendant Judge Sheridan made an order at about 8:20 p.m. removing custody from the parents and authorizing a blood transfusion, the said physicians having stated they would not operate without authority for blood transfusion.

(vii) The court order which was secured reads as follows:

"It appearing that a dependency petition has been filed by Levy Johnston alleging that Jeffrey Ward Elam, born 8-29-56, and resides with his parents Adrian W. and Patricia Elam at 15 - 164th S.W., Bothell, Washington, is a dependent child in that he may need a blood transfusion in order to sustain life as a result of necessary surgery and no parent willing to consent to such transfusion; the court having heard competent medical testimony for the potential need of such a transfusion and further evidence having been adduced; it is now, therefore,

ORDERED, ADJUDGED AND DECREED, that the said Jeffrey Ward Elam is a dependent child as defined by the laws of the State of Washington; IT IS FURTHER ORDERED that the attending physicians treating said child and Stevens Memorial Hospital is hereby authorized to give a blood transfusion if needed and to utilize any other necessary medical techniques required for the preservation of the life of Jeffrey Ward Elam. Dated this 4th day of July, 1964. Phillip Sheridan, Judge of Juvenile Court for Snohomish County, State of Washington."

(viii) An operation was performed as soon as practicable after the entry of said order and the child recovered without a blood transfusion having been performed upon him.

(ix) In the opinion of these defendants, if blood had been given to Jeffrey Elam, his recovery would have been accelerated.

(x) The actions of these defendants, in connection with the proposed use of blood transfusions, was based solely upon their motivation to preserve human life and had

nothing to do with religion or the religious beliefs of the plaintiffs herein.

E. Plaintiffs Lawrence.

(i) Plaintiffs James Lawrence and Helen Lawrence are parents of plaintiff Heidi Jo Lawrence, born May 1, 1964, at Kalispell, Montana.

(ii) Heidi Jo was born with an incomplete trachea esophageal fistula and on that date was taken to the defendant University of Washington Hospital, Seattle, Washington.

R. 935

(iii) Plaintiff James Lawrence then agreed to a suggested operation to correct the congenital abnormality in Heidi Jo, but explained that for reasons of his religion he would not agree to a blood transfusion, and he declined to sign a written form authorizing the giving of a transfusion.

(iv) Defendant physician Lloyd Nyhus requested defendant Carl. B. Erickson, Chief Probation Officer, King County Juvenile Court, to petition defendant King County Superior Judge Theodore S. Turner to make Heidi Jo a ward of the court stating in said petition that a blood transfusion would be necessary to save the life of Heidi Jo and that her parents refused to consent to such a blood transfusion.

(v) A hearing was held before Judge Turner at the conclusion of which the defendant Judge Theodore Turner declared Heidi Jo to be a dependent child and made Heidi Jo a ward of the court. Judge Theodore Turner entered the following order:

> "This matter, having come on for hearing at the University Hospital in Seattle, King County, Washington, the court having heard testimony of Dr. Lloyd Nyhus and of the father, James Elmer Lawrence,

and the court finding that said child was born with a defect which will prove fatal unless surgery is performed and that during surgery it is more probable than not that a blood transfusion will be necessary to save the child's life; and the said James Elmer Lawrence having refused, on religious grounds, to consent to the giving of blood to said minor under any circumstances whatsoever even though necessary to save her life, now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that said Heidi Jo Lawrence is a dependent child, that she be and remain a ward of the court, and that she be placed under the supervision of the Medical Staff of the University of Washington Hospital and said Medical Staff is authorized and directed to render and perform all treatment and procedures including blood transfusions that in their opinion may be necessary for said child's welfare.

IT IS FURTHER ORDERED that said child shall remain in the hospital until ready for release under medical approval.

DATED May 22, 1964.

THEODORE S. TURNER, Judge"

R. 936

(vi) The operation was performed and Heidi Jo Lawrence was given no blood. Defendant Lloyd Nyhus used exceptional care in this surgery to make sure that no blood was necessary.

F. Plaintiffs Pen.

(i) Plaintiffs Jack Pen and Hazel Pen are residents of Bellingham, Whatcom County, Washington, and are parents of plaintiff Michael Pen, born in the year 1951.

(ii) In February of 1961 the said Michael Pen devel-

oped Osteomyelitis, and thereafter generalized staphylococcal infection.

(iii) Physician James G. Mason of Bellingham recommended that Michael be moved from St. Luke's General Hospital in Bellingham to the University of Washington Hospital in Seattle.

(iv) Jack Pen and Hazel Pen refused permission for a blood transfusion to be given to their son at the University of Washington Hospital. They executed a surgical consent.

(v) Defendants Robert A. Aldrich, Warren Guntheroth, John Allen, employees and staff members of said hospital, petitioned defendant Judge William G. Long for an Order making Michael Pen a ward of the Court.

(vi) On March 1, 1961, defendant Judge William G. Long issued the following Order:

> "The Court finds that the allegations in petition are true; that the parents wrongfully refuse to consent to necessary medical care; that the child is dependent; that immediate whole blood transfusions are necessary.
>
> WHEREFORE IT IS HEREBY ORDERED:
>
> University Hospital management and staff are authorized and directed to render such treatment (including blood transfusions) as in the opinion of the said doctors is necessary for the child's health.
>
> That the child is hereby made a ward of the Juvenile Court and to remain so until further order and shall not be released from said hospital until further order.
>
> DATED March 1, 1961.
>
> WM. G. LONG
> JUDGE"

(vii) On the 13th day of April, 1961 defendant Judge William G. Long finding that it would be necessary for Michael Pen to return to the University Hospital for further treatment, on motion of the court entered the following order:

"THE COURT HAVING BEEN ADVISED by L. S. Rambeck, Administrator of University Hospital that MICHAEL PEN'S physical condition is such that he may reside temporarily with his parents, SUBJECT, HOWEVER, to readmission for surgery on April 23, 1961, and

IT FURTHER APPEARING that it will be necessary for him to return to the Hospital on or about April 23, 1961, for further treatment,

NOW, THEREFORE, on the Court's own motion,

IT IS HEREBY ORDERED that MICHAEL PEN be and remain a Ward of this Court to reside in the temporary custody of his parents, and the parents be and they are hereby directed to return him to the Hospital as the Hospital is hereby authorized to render such further treatment as staff of said Hospital deems necessary.

DONE IN OPEN COURT this 13th day of April, 1961.

Wm. G. LONG
JUDGE"

(viii) Blood was given to Michael Pen and he recovered.

G. Plaintiffs Smith.

(i) Plaintiffs Olite Smith and Azell Smith, his wife, are residents of Seattle, King County, Washington, and are parents of plaintiff Jeanetter Smith.

(ii) On the 24th day of August, 1962, plaintiff Jeanetter Smith, then nine years of age, was injured and was taken

to defendant King County Hospital, Unit No. 1 (Harborview).

(iii) On the 28th day of August, 1962 defendant Robert R. Miller, then Chief Pediatric Resident, made a Petition to the King County Juvenile Court in the following language:

"Comes now Dr. R. Miller, a physician in the State of Washington, who alleges the following facts:

R. 938

I.

That the above-named child is the daughter of John Doe Smith and Ezell Smith residing at 1234 King Street, Seattle, Washington.

II.

That on the 24th day of August, 1962 the said child was admitted to King County Hospital, better known as Harbor View Hospital, suffering from injuries to her body.

III.

That in the opinion of the petitioner an immediate blood transfusion is necessary to save the girl's life and preserve her health.

IV.

That the parents of said child were requested to give their consent to a transfusion, but they refused on the basis that it was contrary to their religious beliefs.

V.

Therefore, on the basis of the foregoing facts, this petitioner believes the child to be a dependent child within the definition of RCW 13.04.010(12): "who is grossly and willfully neglected as to medical care necessary for her well being," and prays that this Court make an immediate order that the petitioner be directed to give the child a blood transfusion and such

other medical care as may be necessary for her well being and for such other relief as the court may deem necessary."

(iv) Plaintiff Azell Smith was given a copy of the aforesaid petition at 11:30 a.m., August 28th, and a hearing on the petition was held before Court Commissioner, defendant Robert D. Utter, commencing at 12:35 p.m. on August 28th.

(v) At the conclusion of the hearing defendant Robert R. Utter entered a written order which stated as follows:

R. 939

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING
JUVENILE COURT

IN RE THE WELFARE OF JEANETTER SMITH } No. 39163 ORDER

FILED
IN COUNTY CLERK'S OFFICE
KING COUNTY, WASHINGTON
AUG 28 1962
NORMAN R. RIDDELL Clerk
BY R. M. ALLENBACK Deputy

THIS MATTER, of the welfare of JEANETTER SMITH, a child born October 4, 1952, having come on for hearing before the above-entitled Court on the 28th day of August, 1962, upon the Petition of Robert R. Miller, M.D.; the said Dr. Robert R. Miller; Ezell Smith, mother of said child; J. A. Dull, Minister of Jehovah's Witnesses; being each present, sworn and examined; Mary Louise Jarvis, Court Reporter and Marie MacMahon, Court Supervisor; being each present; the Chief Probation Officer appearing in behalf of said child; the Court, being fully

advised in the premises, finds said child is dependent, in that it has been grossly and willfully neglected in its medical wellbeing, under the Statutes of the State of Washington; Court's Exhibit #1-Pamphlet, entitled "Blood, Medicine and the Law of God" having been offered and admitted in evidence; the Court finds it would be for the welfare of said child to be made a ward of this Court; subject to further order; that the health and welfare of said child requires that permission of this Court be granted to the medical staff of the King County Hospital to administer a blood transfusion to the said child if in their judgment they deem a transfusion necessary:

IT IS THEREFORE ORDERED that JEANETTER SMITH be and remain a ward of this Court; subject to further order; and

IT IS FURTHER ORDERED that permission be and it is hereby granted to the Staff of the King County Hospital, Seattle, Washington to administer a blood transfusion to the said child; JEANETTER SMITH, if in their judgment they deem a transfusion necessary.

DONE IN OPEN COURT this 28 day of AUGUST, 1962.

/s/ Marie MacMahon

/s/ Robert R. Utter
Court Commissioner

R. 940

(vi) As the basis for his written order, Judge Utter stated in his oral opinion:

> "I do not believe that this woman is unconcerned with her child or her child's welfare, and I do not mean to imply this in any statements to her, to Dr. Miller. On the other hand, I believe that her conceptions of what are necessary in medical care run contrary to that of the medical profession and contrary to the beliefs expressed by Dr. Miller, and that within the ac-

cepted medical practice within this county as expressed by Dr. Miller there is a gross and wilful negligence of the child's medical well-being.

"In believing that an emergency does now exist and can exist in the foreseeable future in this case, I will enter an order at this time finding this child to be a dependent child within the terms of the statute, which I have just read."

(vii) Jeanetter Smith recovered without ever receiving a blood transfusion.

(viii) No order terminating the status of Jeanetter Smith as a dependent child and ward of the court was ever entered. She has been living with her parents since on or before September 1, 1962.

H. Plaintiffs Brockman.

(i) Plaintiffs Richard and Bernice Brockman are residents of Lewiston, Idaho, and are parents of a son, Daniel Wayne Brockman, born May 23, 1957, and a daughter Sharilyn, born June 29, 1964, both at defendant Tri-State Memorial Hospital, Clarkston, Asotin County, Washington.

(ii) Daniel Wayne Brockman at birth was suffering from erythroblastosis fetalis. Physicians stated that the child might be mentally or physically retarded and might even die if the transfusion were not performed.

(iii) On May 23, 1957, the plaintiffs Brockman signed and delivered to Tri-State Memorial Hospital a statement as follows:

We the undersigned have been told that our baby boy, born 23rd of May, 1957 at 4:03 a.m. has erythroblastosis fetalis and test indicate the

need of an exchange transfusion. Because of our religious belief we refuse to allow any blood transfusion

or exchange, having been told that such a decision may cause the baby to be physically and mentally handicapped or even the death of the infant. Knowing all these facts we still refuse such treatment and absolve the hospital, their personnel and Dr. Seibly, our family doctor, from blame, should such impairment or death occur.

Signature

/s/ Richard M. Brockman
Father

/s/ Bernice J. Brockman
Mother

Address:
928½ 3rd Street
Lewiston, Idaho

Witnesses: /s/ Loretta E. Peterson, R.N.
/s/ Agnes Giles, L.P.N."

(iv) No blood transfusion was given to Daniel Wayne Brockman between the time of his birth and his discharge from Tri-State Memorial Hospital. Daniel is alive at this time.

(v) Sharilyn Brockman was born to plaintiffs Brockman on June 29, 1964. On June 30, 1964, the defendant James D. Klein filed a petition in the Superior Court of the State of Washington in and for Asotin County in the matter of infant Brockman, which petition reads as follows:

"Comes now the petitioner herein and respectfully shows the Court:

"That infant Brockman, a female child, has been born at Tri-State Memorial Hospital, Clarkston, Washington, on the 29th day of June, 1964.

"That said child is dependent;

"That the parents of said child have failed to give and refuse to give their permission to the doctors and hospital to administer blood transfusion or transfusions and/or to perform such other medical and surgical acts as the medical attendants deem necessary.

"That your petitioner is a licensed and practicing physician and surgeon in the State of Washington, and believes that the said infant is in need of medical attention, which may include surgery and blood transfusion or transfusions to save its life.

/s/ J. D. Klein, M.D.
Petitioner"

R. 942

(vi) That thereafter and on June 30, 1964, upon reading the petition of the defendant James D. Klein and hearing his statement, the defendant Thomas G. Jordan, as Judge of the Superior Court of the State of Washington in and for Asotin County, made an order in said matter reading as follows:

"Upon reading the petition of Dr. J. D. Klein, a practicing physician and surgeon in Clarkston, Washington, known to me, and being advised in the premises, the Court finds:

"That Infant BROCKMAN, a female child, was born in Tri-State Memorial Hospital, Clarkston, Washington (Asotin County) and that the Court has jurisdiction over the person of said infant child and its parents. That the child is dependent.

"That, as a matter of fact, the said child is in need of a blood transfusion and/or other medical attention in order to save its life, but the parents refuse.

"That under the laws of this State, in that the parents refuse to furnish necessary medical attention

for the child, the said infant child should be made a ward of the court.

"WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the said Infant BROCKMAN be and the said child is hereby made a ward of the Court and thereby under the supervision and control of the Court until further order of the Court.

"FURTHER, the attending doctor or doctors and the hospital are not only authorized, but directed to perform all medical and surgical acts, including the administering of blood transfusion or transfusions.

FURTHER, IT IS ORDERED that the said infant child shall remain under the care of the hospital and the doctor or doctors until further order of the court, and the parents or any other person or persons are hereby restrained from interfering in any manner whatsoever with the treatment of said infant child.

"Done this 30th day of June, 1964, at Clarkston, Washington.

/s/ Thomas G. Jordan
Thomas G. Jordan, Judge"

(vii) Blood transfusions were administered to Sharilyn Brockman.

I. Plaintiffs Nichol.

(i) Plaintiffs Neil and Patsy Nichol are a

R. 943

married couple, residents of Kirkland, Washington, and are parents of a daughter Geri Lynn, born July 31, 1966, at Overlake Memorial Hospital, Bellevue, Washington.

(ii) On August 1, 1966, said Geri Lynn was examined at Overlake Memorial Hospital by Dr. Edward Powers who advised that said baby had been born with a congenital

defect in her intestinal tract and recommended abdominal surgery to correct said defect.

(iii) On August 1, 1966, said Geri Lynn Nichol was transferred to defendant Children's Orthopedic Hospital and Medical Center for the purpose of undergoing the recommended operation by Dr. Lester Sauvage who was the surgeon of her parent's choice. He was privileged to use defendant Hospital's facilities, but he was not an employee or agent of defendant Hospital. Upon her admission, plaintiff Neil Nichol notified defendant Hospital's admitting personnel that he was a Jehovah's Witness and signed its admittance slip indicating that he would not consent to blood transfusion. He agreed to any other medical and surgical treatment which might be necessary. In addition Neil Nichol signed a release presented by the defendant Children's Orthopedic Hospital, wherein he released the hospital and doctors from responsibility due to plaintiff Neil Nichol's refusal to permit the use of blood or its derivatives while his child was in the hospital.

(iv) Prior to the operation, defendant Dr. Lester Sauvage who performed the operation told plaintiffs that he hoped to perform the operation without blood, but he informed them of the risks of so doing and requested plaintiffs to be at the hospital that evening at 7:00 p.m., the time scheduled for said operation.

R. 944

(v) The operation was begun by defendant Dr. Lester Sauvage at 8:05 p.m. on August 1, 1966. At or about the time the operation commenced, Dr. Jack Docter, the hospital's Medical Director, was advised that Dr. Sauvage considered it probable that during the course of the operation he would find it necessary to use plasma to save the child's life.

(vi) Plaintiff Neil Nichol was informed of the medical opinion concerning his daughter but refused to consent to a blood transfusion or plasma for both religious and

medical reasons. Defendant Docter telephoned defendant Judge Utter and advised him of the circumstances.

(vii) A hearing was held before Judge Utter on August 1, 1966 in the office of Dr. Jack Docter while the operation was in progress. Dr. Docter testified to the facts set forth in the findings of fact in the court order set forth in subparagraph (viii) herein below. Plaintiff Neil Nichol testified that he refused to consent to said blood transfusion because he believed it would be harmful to his daughter from a medical standpoint, and because it was against his religious beliefs, as one of Jehovah's Witnesses.

(viii) At the conclusion of the hearing Judge Utter entered Findings, Conclusions and Order which read as follows:

"IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING
JUVENILE COURT

IN RE THE WELFARE OF }
JERRY LYNN NICHOL }

FINDINGS, CONCLUSIONS
AND ORDER

"THIS MATTER having come on before the undersigned Judge on this first day of August, 1966, the court acting as its own clerk and having taken the sworn testimony of Dr. Jack Docter and Neal Nichol does

R. 945

now enter the following findings of fact:

I

"That said infant is the child of Mr. and Mrs. Neal Nichol and was brought to the Children's Orthopedic Hospital at 24 hours of age with a distended abdomen.

That it had not passed any meconium or had any bowel movement and was vomiting and regurgitating.

II

"That diagnosis confirmed by X-rays showed a very distended bowel and some calcification within the perineal cavity showing an intestinal obstruction.

III

"That the attending physicians decided immediate surgery was needed and that during the procedure involved in dissecting the bowel the baby's pulse increased to over 200 and the blood pressure was so low it could not be recorded accurately.

IV

"That in the belief of both the surgeon and anesthesiologist plasma or blood was needed to attempt to save the baby's life.

V

"That consent for surgery had been given by both parents, but due to their religious beliefs they refused to consent to the giving of blood or blood derivatives.

VI

"That the father of the child and grandparents were present at the hearing. That they were afforded the opportunity to be represented by counsel, which they declined, and the opportunity to present witnesses on their behalf.

CONCLUSIONS OF LAW

I

"The court has jurisdiction of the parties and subject matter.

II

"That the child is grossly and wilfully neglected as to medical care necessary for his well being.

III

"That the child is a dependent child and should be made a ward of this court as such.

R. 946

IT IS NOW THEREFORE ORDERED that

I

"The child be found to be a dependent child and made a ward of this court.

II

"That as a ward the surgeons of Children's Orthopedic Hospital be authorized to use their discretion to administer blood or plasma if they believe it is absolutely necessary to save the life of the child.

"DONE IN OPEN COURT this 1st day of AUGUST, 1966:

/s/ Robert F. Utter
Judge of the Superior Court"

(ix) As soon as Judge Utter orally announced his judgment reflected in the foregoing order, Dr. Docter ran from his office to the upstairs surgery and arrived there before the operation was completed at 11:15 p.m. but after the administration of plasma had begun at 9:30 p.m. A total of 90 to 100 cc's of plasma had been administered by about 11:30 p.m. when the transfusion was completed. The transfusion of blood plasma had started before the hearing was completed.

(x) A whole blood transfusion was administered pursuant to the aforesaid court order on or about August 2, 1966.

(xi) Geri Lynn recovered.

(xii) From and after August 1, 1966 plaintiffs Nichol have been and now are deeply distressed over the blood

transfusion given their child and are greatly concerned over the harm which said blood transfusions may have done to the physical, mental and spiritual well-being of said child.

J. Plaintiffs Hardy.

(i) Plaintiffs Gene Hardy and Donna Hardy are residents of Walla Walla, Whitman County, Washington. They

R. 947

are parents of plaintiff Loren Hardy, born May 1, 1957, who at the time of the events hereafter described was eight and one-half years old.

(ii) About April 3, 1966, Loren Hardy was severely burned by gasoline flame. Plaintiff parents Gene and Donna Hardy promptly placed Loren in Walla Walla General Hospital.

(iii) Plaintiff Loren Hardy was transferred on the recommendation of Dr. Haft to defendant Children's Orthopedic Hospital and Medical Center in Seattle, Washington, for surgery on April 10, 1966.

(iv) At the time of admission of Loren Hardy to the Children's Orthopedic Hospital plaintiff Gene Hardy had it noted on the admission slip that blood transfusion should not be administered and Donna Hardy thereafter signed a release presented by the defendant Children's Orthopedic Hospital, wherein she released the hospital and doctors from responsibility due to the Hardy's refusal to permit the use of blood or blood derivatives while their child was in the hospital.

(v) On or about April 18, 1966, a skin graft was performed by Dr. Donald Hall on plaintiff Loren Hardy.

(vi) During the evening of April 18, 1966 plaintiff Gene Hardy received a telephone call from defendant Judge Walter T. McGovern, who inquired if plaintiffs would

submit to a court order directing a blood transfusion. Plaintiff Gene Hardy informed defendant Judge McGovern that plaintiffs would not submit to such a court order and that they opposed blood transfusions for themselves or their children on the basis of their religious convictions as Jehovah's Witnesses and in exercise of their own personal judgment as to what was medically advisable, having taken

R. 948

into consideration the medical risks connected with blood transfusions and the Hardys' knowledge that doctors have differing opinions in respect to blood transfusions. Plaintiff Gene Hardy informed said judge that the Hardys felt they had sufficient grounds for refusing a blood transfusion, not because they didn't have feeling or responsibility for their son, but because they did.

(vii) Defendant Judge McGovern then informed plaintiffs Hardy by telephone that he understood plaintiffs' position but was going to issue an order declaring Loren Hardy to be a dependent child under Washington statutes and authorizing Dr. Donald Hall to administer a blood transfusion if necessary.

(viii) Defendant Judge McGovern issued an oral order declaring plaintiff Loren Hardy to be a dependent child under RCW 13.04, making said child a ward of the court, and authorizing Dr. Donald Hall to administer blood transfusion or blood transfusions, if necessary, to Loren between midnight and 1:00 a.m. on April 19, 1966. Said oral order was issued between midnight and 1:00 o'clock a.m. on April 19, 1966.

(ix) No blood transfusion was ever administered to Loren Hardy. He left defendant hospital and returned to Walla Walla on or about May 9, 1966 and is now recovered.

XVI.

This court abstains from making any finding as to

whether the refusal by plaintiffs to consent to blood transfusions of their children when in the judgment of their physicians such treatment is necessary to preserve human life, constitutes "gross and wilful neglect" for purposes of RCW 13.04.010(12), where it appears that such parental refusals are on religious grounds and also because such parents believe that transfusions are medically dangerous and that other medical methods are adequate or superior.

R. 949

XVII.

This court finds that in each of the cases listed by the plaintiffs the patient's treating physician testified, or alleged in his petition to the court, that the parent's refusal to allow blood transfusions may have jeopardized the patient's life and that a court order was justified.

XVIII.

The court finds that in four of the ten individual cases referred to above, no transfusion was given until after entry of a written order following a hearing of which the parents had reasonable notice. However, in the Brockman, Seelye and Elam cases it does not appear that the parents had reasonable notice of the hearing; in the Maydole and Hardy cases, transfusions were given on the basis of oral orders prior to the entry of written orders, and in the Nichol case the transfusion was started while the hearing was in progress and was almost complete before an oral order of authorization was announced by the court, followed by a later written order. In these six instances, the petitioning doctors and the judges in question proceeded in the manner described apparently in the sincere belief that the urgency of the situation required expedited action.

XIX.

The court finds that apart from refusal of the parents to agree to blood transfusions because of their objection on religious and medical grounds, in none of the cases

listed by the plaintiffs has there been any allegation or proof of neglect of the children involved.

XX.

Defendant-physicians, in each of the cases set forth in finding of fact XV, acted with the sole purpose to preserve and protect their patient's life; therefore, when treatment

R. 950

which in their opinion is essential to that purpose is refused by parents, then they have sincerely felt, on the basis of their medical opinion, that they had no recourse but to either refuse to further treat the patient or to seek through court action authority for said treatment. Defendant-hospitals have only sought intervention of the court when in the judgment of the attending physician a life-threatening situation exists.

XXI.

Defendant Superior Court Judges in all situations described in finding of fact XV granted the orders requested only after receiving the testimony or examining the verified petitions of physicians to the effect that an emergency existed which necessitated a court order to preserve and protect patient's life, and blood transfusions were authorized by said defendants only where they concluded the welfare of minor children was involved.

XXII.

Defendant-physicians, even when authorized to administer blood transfusions by the court, avoided giving such transfusions unless they felt compelled to do so by medical necessity.

XXIII.

This court finds that a forum other than the federal court is available to plaintiffs to litigate the question of whether parental acts of the kind described above constitute "gross and wilful neglect" within the meaning of RCW 13.04.010(12).

R. 951

From the foregoing findings of fact the court makes the following

CONCLUSIONS OF LAW

I.

JURISDICTION

The court has jurisdiction in this action by virtue of the following statutes:

(a) Section 1343(3) and section 1343(4), Title 28, United States Code;

(b) Sections 1983 and 1988, Title 42, United States Code;

(c) Section 2201, Title 28, United States Code;

(d) Sections 2281 and 2284, Title 28, United States Code.

II.

This is an appropriate case for the federal court to decline jurisdiction under the doctrine of judicial abstention in that plaintiffs have an adequate remedy available in the state courts sufficient to preclude prior resort to a federal court for protection of their federal rights.

III.

In Washington, the question of mootness does not preclude review by the appellate court if the issues present are of sufficient public interest to warrant deciding a moot question.

IV.

The right to refuse blood transfusions for their minor children by the adult plaintiffs in the cases presented herein is neither protected nor guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

R. 952

V.

The action will be dismissed as to all defendants with taxable costs allowed.

DATED November 20th, 1967.

/s/ FREDERICK G. HAMLEY
Frederick G. Hamley
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
William J. Lindberg
United States District Judge

/s/ W. T. BEEKS
W. T. Beeks
United States District Judge

R. 953

JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 6595

[SAME TITLE]

[Filed November 20, 1967]

This action came on for trial on June 19, 20 and 21, 1967 before the undersigned judges sitting by designation as a three-judge district court, and the issues having been duly tried and a decision having been duly rendered and findings of fact and conclusions of law entered,

IT IS ORDERED AND ADJUDGED

That the plaintiffs be denied the relief sought, that the action be dismissed on the merits, and that the defendants recover of plaintiffs their costs of this action.

DATED November 20th, 1967.

/s/ FREDERICK G. HAMLEY
Frederick G. Hamley
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
William J. Lindberg
United States District Judge

/s/ W. T. BEEKS
W. T. Beeks
United States District Judge